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# Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales

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# Contesting Gender in Popular Culture and Family Law: *Middlesex* and Other Transgender Tales

SUSAN FRELICH APPLETON\*

## I. CAL AND HIS COHORT

They're everywhere: transsexuals, intersexed individuals, and others of uncertain gender classification. Transgender issues have come out of the closet as popular culture seems to have discovered a new favorite. Recently, several successful books and movies, not to mention frequent television coverage on both talk shows and science programs, have introduced the public to numerous ordinary people whose very existence challenges the notion that sex and gender provide life's fundamental organizing principles. In turn, the law's reliance on strict sex-based categories becomes increasingly fragile, indeed too fragile to withstand challenges to marriage laws requiring a male and a female.

One of the most prominent pop-culture examples these days is Cal, formerly Calliope ("Callie"), Stephanides, the protagonist of Jeffrey Eugenides's Pulitzer-Prize-winning novel *Middlesex*.<sup>1</sup> Several reviews emphasize the theme of transformation in the story told by this delightful and sympathetic narrator,<sup>2</sup> who "was born twice: first, as a baby girl . . . and then again, as a teenage boy."<sup>3</sup> This theme of transformation might explain why Eugenides decided on a protagonist with 5-alpha-reductase deficiency syndrome because such male "pseudohermaphrodites" appear female at birth and through childhood, only to experience at puberty the masculinization belatedly triggered by their XY chromosomes.<sup>4</sup> In Cal's case, the condition comes

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1. JEFFREY EUGENIDES, *MIDDLESEX* (2002).

2. See, e.g., Bill Goldstein, *A Novelist Goes Far Afield but Winds Up Back Home Again*, N.Y. TIMES, Jan. 1, 2003, at E1 (describing *Middlesex* as "a novel of metamorphoses and transformations"); Julie Wheelwright, *Books: Across the Great Divide: Gender Confusion and Greek Tragedy Have Bred an American Epic*, THE INDEPENDENT (LONDON), Oct. 19, 2002, at 41 ("Eugenides . . . brilliantly weaves together strands of genetic heritage, mistaken identity and transformation . . .") (book review), available at LEXIS, News Library, Indpnt File.

3. Eugenides, *supra* note 1, at 3.

4. People with 5-ARD [5-alpha-reductase deficiency] are . . . chromosomally and gonadally male, but have genitals that may be ambiguous or more female than male in appearance until puberty. Due to a lack of the enzyme 5-alpha-reductase, these children cannot convert their body's normal production of

from a recessive gene that he traces to his grandparents; as a result, for young Callie adolescence unexpectedly brings facial hair, a muscular body, an emerging penis (her "crocus," which "blooms"<sup>5</sup>), as well as a growing attraction to a classmate at her all girls' school.

Cal narrates a riveting story. Despite an occasional caricature, many of those populating the book, including his ancestors, come to life, thanks to Eugenides's thoughtful portrayals and attention to details, as recalled by Cal. The epic tale, which pays dutiful homage to the classics, demonstrates an evocative sense of place (or places): from war-ravaged Smyrna in 1922, to Detroit from the Prohibition era until after the ghetto upheavals of the 1960s, to private-school suburbia in the late 1960s, with brief visits to the seamy side of San Francisco in the mid-1970s and then to contemporary Berlin. Although the story has many hallmarks of a Greek tragedy, the protagonist meets a bittersweet, rather than a disastrous, end.<sup>6</sup>

Yet for purposes of this essay, more significant than the transformation theme, the classical allusions, and the historical meanderings is the simple fact that Cal, like Calliope before him, emerges as an enormously engaging figure about whom the reader cannot help but care. Given his unusual sexual circumstances, what effect does this protagonist with such a winning personality have on our understanding of sex and gender and, in turn, the way the law approaches these categories?

In addressing this question, this essay explores two primary threads. First, this essay examines what Cal's fictional and lighthearted story adds to the true, tragic story of David Reimer, a notorious "test case" in the nature/nurture debate about gender.<sup>7</sup> Second, this essay considers what Cal and the other transgendered figures in popular culture contribute to the ongoing public conversation about legal sex-based classifications, particularly the male-female requirement for marriage. In addition to exposing several overlooked nuances in David Reimer's history (all with significance for the law), the lens of *Middlesex* reveals the continuing erosion of our traditional understanding of sex and gender. Popular culture has reinforced contemporaneous legal developments, bringing prevailing prohibitions against same-sex marriage to the brink of collapse.

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testosterone into dihydrotestosterone ("DHT"), a process which is necessary for the development of male genitalia . . . [W]ith the production of more testosterone at puberty, children with 5-ARD will develop secondary sex characteristics standard for men, including facial hair, muscularization of the body, and deepening of the voice, despite the continued low levels of DHT. That is, they go from looking outwardly female to looking outwardly male. Often, their testicles will voluntarily descend and the small phallus will increase in size enough to be considered a small penis.

SHARON E. PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* 29 (2003).

5. EUGENIDES, *supra* note 1, at 376, 386–88.

6. A tragedy usually features "a fatal or disastrous conclusion." THE OXFORD COMPANION TO ENGLISH LITERATURE 1023 (Margaret Drabble ed., 6th ed. 2000).

7. See David Reimer, 38, *Subject of the John/Joan Case*, N.Y. TIMES, May 12, 2004, at A21 (obituary). For a more extensive introduction of David Reimer, see *infra* notes 22–33 and accompanying text.

Certainly, I am not the first observer to remark on the recent efflorescence of transgendered<sup>8</sup> characters in popular culture.<sup>9</sup> Moreover, like Eugenides, I am an appropriate target for criticism because I am writing about transgender issues without meeting face-to-face with a person who could tell me about such lived experience.<sup>10</sup> Yet for this reason, my perspective should come closest to the mainstream view that I want to emphasize here—the view of those members of the general public who have recently encountered this world through books, movies, theater, and the media. Although feminist scholars and queer theorists have had much to tell their colleagues about the artificiality of traditional gender categories,<sup>11</sup> the “mainstreaming” of transgendered characters also deserves analysis.

A *Who's Who* of such characters would no doubt include, in addition to Cal Stephanides, Dana, the male-to-female transsexual at the center of Chris Bohjalian's sweet romantic novel, *Trans-Sister Radio*, published in 2000, and Brandon Teena, the anatomical male living as a female, whose portrayal in *Boys Don't Cry* won Hilary Swank a 2000 Academy Award.<sup>12</sup> It might also include Calpernia Addams (a male-to-female transsexual whose male lover was killed in a well-publicized act of anti-gay violence in the military),<sup>13</sup> Cheryl Chase (the often televised former director of the

8. On the use of terminology, including “male,” “female,” “sex,” “gender,” “transgendered,” “transsexual,” and “intersexed,” see *infra* Part III.A.1.

9. See, e.g., J. MICHAEL BAILEY, *THE MAN WHO WOULD BE QUEEN: THE SCIENCE OF GENDER-BENDING AND TRANSEXUALISM* 143 (2003) (“Transsexuals are hot.”); Sharon Doyle Driedger, *Gender Paradoxes*, *MACLEAN'S*, May 26, 2003, at 33 (cover story); Nazila Fathi, *As Repression Eases, More Iranians Change Their Sex*, *N.Y. TIMES*, Aug. 2, 2004, at A3; John Jurgensen, *Born Ambiguous: Exploring the Phenomenon of People Born with Genitalia Not Easily Categorized as ‘Male’ or ‘Female,’* *HARTFORD COURANT*, Nov. 6, 2002, at D1; Mireya Navarro, *When Gender Isn't a Given*, *N.Y. TIMES*, Sept. 19, 2004, §9, at 1; Dinitia Smith, *On Being Male, Female, Neither or Both*, *N.Y. TIMES*, Oct. 29, 2002, at F5; see also Susan Frelich Appleton, *Gender Contests*, *J. GENDER-SPECIFIC MED.*, Sept./Oct. 2002, at 11; Barron H. Lerner, M.D., *If Biology Is Destiny, When Shouldn't It Be?*, *N.Y. TIMES*, May 27, 2003, at F6; Simon J. Nadel, *When Harry Becomes Sally: Transgender Issues Increasingly Confront Employers*, 70 *U.S. L. WK.* 2379 (2002).

10. See Jurgensen, *supra* note 9 (quoting Thea Hillman, who “took issue with portions of Eugenides’ novel because ‘by using a person with intersex as a literary tool without ever talking to one, he’s not doing anything different than the doctors who use people with intersex as case studies’”). By contrast, consider Sharon Preves’s book, based on interviews of thirty-seven intersexed adults, and Pat Cain’s thoughtful use of narratives from female-to-male transsexuals, among others. PREVES, *supra* note 4, at 8; Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 *DENV. U. L. REV.* 1321, 1336–51 (1998).

11. See, e.g., ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 *CAL. L. REV.* 1 (1995).

12. See, e.g., Rick Lyman, *‘American Beauty’ Tops the Oscars: Main Acting Awards Go to Kevin Spacey and Hilary Swank*, *N.Y. TIMES*, March 27, 2000, at E1.

13. David France, *An Inconvenient Woman*, *N.Y. TIMES*, May 28, 2000, § 6 (Magazine), at 24. See also Margo Jefferson, *Just an Ordinary Guy Finds Unordinary Love*, *N.Y. TIMES*, May 31, 2003, at B16 (reviewing a television movie about the case); *Slain Gay Soldier’s Case Slows a General’s Rise*, *N.Y. TIMES*, May 18, 2003, § 1, at 32.

ISNA, the Intersex Society of North America),<sup>14</sup> and several children and young adults whose stories of gender defiance have made their way into the popular press.<sup>15</sup> In 2003, nonfiction fans got to know novelist and English professor Jennifer Finney Boylan while curling up with her memoir about her sex change, *She's Not There: A Life in Two Genders*; more passive couch potatoes met a midwestern husband who had surgery to become a woman in *Normal*, an HBO film starring Jessica Lange and Tom Wilkinson.<sup>16</sup> In 2004, the Pulitzer-Prize-winning drama *I Am My Own Wife* introduced New York theatergoers to an East German transvestite; publicity about the play widened when it received Tony awards for best play and best actor.<sup>17</sup>

Does such attention to transgender issues really represent something new? I do recall during my childhood popular preoccupation with the case of male-to-female transsexual soldier Christine Jorgensen (whose 1952 sex-reassignment surgery, featured in *Life Magazine*, was reportedly the first publicly discussed) and later with physician and tennis player Renee Richards (in the mid-1970s). Similarly, I remember Diane Arbus's haunting photographs of hermaphrodites (published posthumously in 1972), perhaps my first introduction to intersexed individuals (which, in retrospect, unmasked my sorely incomplete exposure to the classics<sup>18</sup>). Yet these figures gained prominence as part of a cultural scene that presented them as fascinatingly deviant. Jorgensen's and Richards's stories emerged as bizarre and shocking precursors to the sensationalism that became commonplace on television shows such as Jerry Springer.<sup>19</sup> Similarly, Arbus's hermaphrodites form part of a photography collection that also

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14. See, e.g., *Is It a Boy or a Girl?* (Discovery Channel television broadcast, March 2000).

15. These include little Patrick Harmon-Smith, an intersexed child whose parents tried mightily to resist "normalizing" (feminizing) surgery only to learn that a physician had duped them when they consented to a biopsy of his undescended testicle. See *Gender Unknown* (Discovery Health Channel television broadcast, Jan. 2001); Sally Lehrman, *Sex Police*, SALON.COM, at [http://www.salon.com/health/feature/1999/04/05/sex\\_police](http://www.salon.com/health/feature/1999/04/05/sex_police) (Apr. 5, 1999). Other candidates for this list include a middle-school girl "passing" as a boy (see Benoit Denizet-Lewis, *About a Boy Who Isn't*, N.Y. TIMES, May 26, 2002, §6 (Magazine), at 30) and a female student whose preference for male attire prompted her to sue her local school board to overturn a yearbook-photo dress code requiring off-the-shoulder drapes for girls and coats and ties for boys (see *Fox on the Record with Greta Van Susteren* (Fox television broadcast, June 20, 2002)). See also Fred A. Bernstein, *On Campus, Rethinking Biology 101*, N.Y. TIMES, Mar. 7, 2004, § 9, at 1 (depicting several openly transgendered college students).

16. See Emily Nussbaum, *When an Ex-Man Loves a Woman*, N.Y. TIMES, March 16, 2003, §2, at 38 (film review).

17. Jesse McKinley, *Puppet Musical Wins Big, as Does 'My Own Wife'*, N.Y. TIMES, June 7, 2004, at E3.

18. I refer here to the ancient Greek myth about Hermaphroditos, son of Hermes and Aphrodite, who became joined in one body with a nymph.

19. A quite favorable review of the opera inspired by the Jerry Springer show supports this generalization. See Caryn James, *Now in London: I Was Jilted by a Lesbian Dwarf!*, N.Y. TIMES, May 11, 2003, § 2, at 7 (the opera "embraces the Springer carnival of freaks even while sending it up").

includes other “freaks,” from identical twins and giants to adults with Down syndrome.<sup>20</sup>

By contrast, with Cal and the others in today’s cohort, their down-to-earth humanity, their emotional normality, and their tugs on our empathy all stand out to evoke quite different reactions than their cultural predecessors. Still, the response might well remain “so what?”—we now live in a different era, after both the sexual revolution and the coming of age of civil rights.<sup>21</sup> It should come as no surprise that today’s portrayals and attitudes about transgendered people are more positive and less judgmental than before. Yet, that’s just the point; legal change is a dynamic process that takes place in a larger social context. As one sample of modern popular culture, Cal’s story elucidates contemporaneous developments in the law and invites thought experiments about the forks in the road that lie ahead.

## II. TRANSITIONING TO *MIDDLESEX*

The path from Christine Jorgensen and Jerry Springer does not lead directly to Cal and his contemporaries, however. An important transitional object along the way toward present attitudes and sensibilities is the story (or, more accurately, the stories) of the man we came to know as David Reimer. In fact, one can easily see in *Middlesex* echoes of what we have learned about David Reimer—depicted, however, in a softer, more equivocal, and ultimately more instructive light.

The first version of David’s story appeared in 1972 in the scientific publications of Dr. John Money. Money’s famous papers claimed to establish “nurture,” as distinguished from “nature,” as the basis of gender by detailing how a baby boy (originally named Bruce Reimer), who lost his penis as the result of a circumcision mishap, was successfully reared as a girl.<sup>22</sup> Following Money’s expert advice, the devastated parents had the child’s testicles surgically removed, tried their best to treat the child (renamed Brenda) as a daughter, and kept this medical history a closely held secret, because Money had explicitly warned that any breach would compromise their child’s “cure.” For his part, Money took full advantage of the fact that the child had an identical twin brother (Brian Reimer)—a feature that gave the case the trappings of a legitimate scientific experiment, specifically a “control group.”<sup>23</sup> According to Money’s reports, the sex reassignment produced a happy, healthy daughter who would need only a little help from hormonal treatments and genital surgery as she became older.

20. See, e.g., Arthur Lubow, *Arbus Reconsidered*, N.Y. TIMES, Sept. 14, 2003, § 6 (Magazine), at 28, 31 (“Without sentimentalizing them or ignoring their failings, she liked and admired her freaks.”).

21. This generalization now includes some gay rights. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

22. JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 118–23 (1972); see also JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* 33–34 (2000) (quoting an unspecified 1955 work of Money).

23. See COLAPINTO, *supra* note 22, at 67–69; FAUSTO-STERLING, *supra* note 11, at 66–67.

Although we later learned that there was something dreadfully wrong with this picture, Dr. Money's version of the story acquired a life of its own. Medical protocols for intersexed children relied on Money's theory of "gender plasticity."<sup>24</sup> Scholarly analyses in many different fields presented gender as entirely a social construct.<sup>25</sup> For example, in family law, a law school course I have taught for almost thirty years, three different editions of one of the leading casebooks included an excerpt from John Money and Anke Ehrhardt's report to invite discussion of marriage laws that require one male and one female.<sup>26</sup> What is the purpose of such requirements if anyone can be a male or female with appropriate medical assistance and social support, as Money's study suggested?

David Reimer went public with a very different version of the story in 2000, primarily through the publication of John Colapinto's *As Nature Made Him: The Boy Who Was Raised as a Girl* and through David's own television appearances as well. David claimed that, as Brenda, he had had an utterly miserable childhood.<sup>27</sup> He felt he never fit in,<sup>28</sup> and responding to others' gendered expectations of him only intensified his alienation.<sup>29</sup> His despair peaked as he approached adolescence, ultimately forcing his parents to renege on their commitment to secrecy. Contrary to Money's warnings, David found the revelation that he had been born a male a welcome relief because it provided an irresistibly simple explanation for his overwhelming distress.<sup>30</sup> At age fourteen, he resumed a male identity, took the name David, and began a life that later included marriage and fatherhood of his wife's three children, whom he adopted. Then, in 2004, David's story abruptly and tragically ended with his suicide; according to his obituary, his mother attributes David's death to Money's experiment.<sup>31</sup>

At first glance, the moral of the tragic version of David's story makes nature triumphant and gender inalterably hard-wired. Certainly, Colapinto's book presents

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24. SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 7 (1998). On how Money's work influenced the development of the medical standard, see *id.* at 15–16; COLAPINTO, *supra* note 22, at 75–76; PREVES, *supra* note 4, at 52–54.

25. See COLAPINTO, *supra* note 22, at 69–70. But see KESSLER, *supra* note 24, at 7 (critiquing Money's theory for "putting so much emphasis on the genitals as evidence of gender"); *id.* at 25 (detailing Money's reliance on genital measurements for sex-assignment decisions). Indeed, Money's own work emphasizes biological or "natural" influences, including prenatal exposure to hormones. See MONEY & EHRHARDT, *supra* note 22, at 98–103 (reporting "masculinized" behavior of "fetally-androgenized, genetic females").

26. See JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 30–33 (1978); *id.* at 24–26 (2d ed. 1985); *id.* at 30–33 (3d ed. 1992). But see *id.* at 46 (4th ed. 1999) (reporting more recent evidence showing failure of Money's approach in Reimer's case).

27. COLAPINTO, *supra* note 22, at xii–xiii.

28. See *id.* at 60–62, 148.

29. *Id.* at 101–02, 107, 122–23, 145; see also *id.* at 190 (discussing young David's attraction to females).

30. *Id.* at 180. For a much earlier case, from 1888, in which "mistaken" female sexual assignment reportedly resulted in truancy, disobedience, and "moral perversion" (all signs "of the true sex trying to overcome the 'torture' of a mistaken sex"), see ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 76–78 (1998).

31. See David Reimer, 38, *Subject of the John/Joan Case*, *supra* note 7, at A21; see also Elaine Woo, David Reimer, 38; *After Botched Surgery, He Was Raised as a Girl in Gender Experiment*, L.A. TIMES, May 13, 2004, at B12.

David's experience as a decisive refutation of Money's theory that culture and environment determine gender.<sup>32</sup> Whatever rethinking of gender that Money's work had sparked in fields ranging from pediatric medicine to feminist theory to family law, Colapinto dismisses such developments as errors resting on false foundations. And certainly, it would be easy to see David's suicide as reinforcement of Colapinto's conclusions about the harm of those years spent in the "wrong gender."<sup>33</sup>

Yet to take home from David's history only the message that "nature rules" requires overlooking other important elements and the issues that they raise—including the impact of family secrets, the limits of parental autonomy, and parents' frequent need to rely on experts. When *Middlesex* revisits each of these elements, it softens and removes much of the sting that David experienced. By diminishing the harshness of David's story while preserving some of its central ingredients, Cal's chronicle brings to light complexities that the shocking headlines about David Reimer have obscured.

### A. The Burden of a Family Secret

First, without minimizing poor David's childhood agonies, one can raise questions about the cause.<sup>34</sup> Certainly, he lived with parents burdened by a terrible secret. This secret, with the deep guilt that lingered after the circumcision accident, must have cast an inescapable pall over every aspect of the family relationship. Imagine how the Reimer parents must have felt knowing what they knew, and yet feeling bound not to tell their child, whose successful "treatment" depended on their secrecy. Some of the recent literature about the benefits of open adoption at least suggests that secrecy itself can cause psychological damage to children.<sup>35</sup> Yet Colapinto's single-minded emphasis on a childhood spent in the "wrong gender" has removed from the afterlife of David's story questions about the role that secrecy might well have played.

Cal, too, is the heir of an unusual family secret. His paternal grandmother and grandfather were sister and brother, passionately attracted to one another. They refashioned themselves as young lovers and married at sea during a harrowing flight to America, where they could make a fresh start—with no one aware of their preexisting connection. They had qualms about their relationship, but no knowledge of the recessive gene their union would vitalize.

32. See COLAPINTO, *supra* note 22, at xiv; see also PREVES, *supra* note 4, at 97. But see JUDITH BUTLER, UNDOING GENDER 64–69 (2004) (examining David's story as paradox and allegory).

33. See also *infra* note 85 and accompanying text (explaining the difficulty of identifying the "cause" of David's suicide).

34. A few alternative explanations have been advanced. See BAILEY, *supra* note 9, at 46 (speculating that, at seventeen months, Brenda might have been too old for successful reassignment); KESSLER, *supra* note 24, at 6–7 (suggesting ambivalent parents might have given Brenda mixed messages); see also COLAPINTO, *supra* note 22, at 250 (reporting that Money leaked rumors about parents' inability to accept child as a daughter, thus unconsciously undermining reassignment).

35. See, e.g., Annette Baran & Reuben Pannor, *Open Adoption*, in THE PSYCHOLOGY OF ADOPTION 316, 318 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN 125, 127–28 (Spring 1993).



Cal, the narrator, knows all these facts from the opening pages of *Middlesex*. Young Callie and the others in the replayed family history do not, however. (Of course, the grandparents themselves know their romance is incestuous, and they periodically experience shame, fright, regret, and guilt about it.) Although Callie's grandparents occupy an important position in her young life, their secret is about *them*, and not at all about her. Because even her parents are not aware of the secret, the shadow cast on Callie's family relationship lacks the directness and intensity we find in David's case. When Cal, the adult, describes a happy childhood, despite being reared in the "wrong gender," perhaps the different place of secrets in the Reimer and Stephanides families accounts for the contrasting retrospectives.

By creating a secret once removed, Eugenides offers a "kinder, gentler" version of a key element of David's story, while allowing plenty of room to confront the questions that this fact evokes: what sorts of secrets can members of well-functioning families have? When does a child's need for healthy, emotional growth compel parents (and grandparents) to share information with him or her? Are long-term secrets about a child always misguided, or can they ever be justified as serving the child's own well-being?

Consider here the traditional way of dealing with some intersexed children, especially those with androgen insensitivity syndrome ("AIS"). These are chromosomal males who appear female and generally are reared as such.<sup>36</sup> Indeed, at puberty they typically develop what the literature refers to as "voluptuous female figure[s]."<sup>37</sup> The conventional wisdom has been not to share with the patient the results of chromosomal tests usually performed at adolescence to determine the cause for the absence of menstruation.<sup>38</sup> In fact, I recall the comments of a physician not long ago during an academic discussion of paternalism versus informed consent; he mentioned such AIS cases as the sole situation he knew in which, today, doctors routinely do not provide full information to their patients.<sup>39</sup> Intersex activists have now challenged this practice because of the harm that they claim it inflicts.<sup>40</sup>

36. AIS children have an X and an Y chromosome and active testes, but because their cells are insensitive to testosterone, they cannot develop masculine secondary sex characteristics and often respond at puberty to their own testicular estrogen by developing a voluptuous female figure. Such children are generally raised as girls, both because of their feminine body structure and because past experience has shown that AIS children usually develop a female gender identity. Often the AIS child's testes are removed . . .

FAUSTO-STERLING, *supra* note 11, at 64.

37. *Id.* Dreger reports the story of and includes a photograph of a Parisian model with AIS (an attractive female). DREGER, *supra* note 30, at 130–32.

38. See FAUSTO-STERLING, *supra* note 11, at 64–65; Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 50–55 (2000); Navarro, *supra* note 9, at 1; see also Ann Cote, *Telling the Truth: Therapeutic Privilege and Intersexuality in Children*, 8 HEALTH L.J. 199, 203–08 (2000) (questioning application of "therapeutic privilege" as justification for nondisclosure in such cases).

39. Beyond these secrets, do secrets with genetic consequences for future generations belong in a class by themselves, in which the right to know always trumps privacy concerns? Suppose Cal's grandparents knew of the recessive gene they carried? On the other hand, what of

David's story, as illuminated by Cal's, suggests that openness, no less than "nature," should guide how families and physicians respond to young persons in their care.

### *B. Parental Autonomy Gone Awry*

David's own version of his story also sounds a cautionary note about the limits of parents' ability to mold their children—a lesson that reaches well beyond the divide that gender is thought to create. No matter how hard they tried to follow Money's childrearing directives, the Reimers could not make their child into "Brenda."

In *Middlesex*, this theme plays out at two levels. First, Cal's very existence embodies parental wish fulfillment, haunted by guilt. His parents not only dreamed of a daughter but had the audacity to "mess with Mother Nature" in a studied effort to create one. Following a purportedly scientific method of determining offspring's sex based on the timing of intercourse during the woman's ovulatory cycle, Cal's parents tampered with one of the mysteries of life.<sup>41</sup> When the parents appeared to get just what they had wanted, a baby girl, they were oblivious to the fateful consequences of their choice. Any of an infinite number of variations would have produced a different child, quite probably without the 5-alpha-reductase deficiency syndrome that forms the centerpiece of Cal's story and that came from the joinder of an egg and a particular sperm each with the same familial mutation tracing back to a tiny Greek village.<sup>42</sup>

a family member's right not to know such information? See, e.g., Tamar Lewin, *Boom in Gene Testing Raises Questions on Sharing Results*, N.Y. TIMES, July 21, 2000, at A1; see also *Pate v. Threlkel*, 661 So.2d 278, 281 (Fla. 1995) (holding that a physician has a duty to tell patient about risk to patient's offspring).

40. On the importance of physicians' openness with their intersexed patients, see FAUSTO-STERLING, *supra* note 11, at 85 and PREVES, *supra* note 4, at 108–09. See also DREGER, *supra* note 30, at 190–92 (noting patients' objections to secrecy).

41. It was the father's idea, but the mother acquiesced, although with misgivings. See EUGENIDES, *supra* note 1, at 8.

42. As Cal narrates, after the fact, the story of his own conception:

The timing of the thing had to be just so in order for me to become the person I am. Delay the act by an hour and you change the gene selection. . . .

. . . .

. . . Inside my mother, a billion sperm swim upstream, males in the lead. They carry not only instructions about eye color, height, nose shape, enzyme production, microphage resistance, but a story, too. Against a black background they swim, a long white silken thread spinning itself out. The thread began on a day two hundred and fifty years ago, when the biology gods, for their own amusement, monkeyed with a gene on a baby's fifth chromosome . . . [Now] the biology gods knew this was their time, this was what they'd been waiting for, and . . . my destiny fell into place . . . [E]verything was in place, the roller coaster was in free fall and there was no stopping it now, my father was seeing visions of little girls and my mother was praying to a Christ Pantocrater she didn't entirely believe in, until finally—right this minute!—on Greek Easter, 1959, it's about to happen. The gene is about to meet its twin.

As sperm meets egg, I feel a jolt.

*Id.* at 11, 210–11.

Second, near the end of *Middlesex*, when the parents finally seek medical help because of Callie's failure to menstruate and other unexpected difficulties, they clearly want to follow the recommendations necessary for their daughter to remain a daughter. Without fully grasping that Callie is, in fact, biologically male, they seem ready and willing to choose her destiny, and they expect her to follow compliantly. Instead, Callie escapes in order to make the transition to a male identity.

Thus on both levels, we again have in *Middlesex* David's story but without such a brutal edge. Through their self-consciously timed conception, Cal's parents tried to fashion the child they wanted. Their efforts were fleeting; those of David's parents were sustained. For Cal's parents, the child did not yet exist, so the terrible battle of wills one envisions within David's family, as the parents tried to create a daughter pursuant to Dr. Money's prescription, is—to the reader's relief—missing from Cal's story. Then, before the efforts to force continued "daughterhood" on an unwilling son reach full tilt, Cal (now a resourceful adolescent) leaves to chart his own course.

Freed from the oppressive weight of David's suffering, a narrative about parental efforts to create the child of their choice necessarily calls attention to the tension parents and our expectations of parents evoke every day. The overarching question, revealed by Cal's tale, asks: to what extent do we expect parents (especially mothers) to be self-sacrificing—to subordinate their own wishes and preferences? A closer look at the determination of Cal's parents to conceive a daughter raises more pointed questions: as the increasing popularity of assisted reproductive technologies reveals, don't people always have children to satisfy their own needs, because the notion of having a child for the sake of the child is incoherent? As these technologies give parents more control over the characteristics of their children, including sex,<sup>43</sup> will such families pay a price in unintended consequences or as "punishment" for exercising a power that ought to reside elsewhere?<sup>44</sup> Once we squarely recognize procreation as parental wish fulfillment, what are its limits?<sup>45</sup>

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43. See, e.g., Lisa Belkin, *Getting the Girl*, N.Y. TIMES, July 25, 1999, § 6 (Magazine), at 26 (examining parental use and ambivalence about sperm-sorting technology designed to produce conception of desired sex); Amy Dockser Marcus, *Ensuring Your Baby Will Be Healthy: Embryo Screening Test Gains in Popularity and Controversy*, WALL ST. J., July 25, 2002, at D1 (discussing prenatal genetic diagnosis); Claudia Kalb, *Brave New Babies*, NEWSWEEK, Jan. 26, 2004, at 45; see also Michael J. Sandel, *The Case Against Perfection*, THE ATLANTIC, April, 2004, at 51, 53, 56 (explaining how sex selection and other ways of choosing characteristics of offspring contravenes "ethic of giftedness," that is, appreciating "children as gifts" and accepting "them as they come"); THE PRESIDENT'S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS, Ch. 2, § 2 (Oct. 2003), at [www.bioethics.gov](http://www.bioethics.gov).

44. Near the end of *Middlesex*, Cal observes: "Tessie Stephanides [his mother], who in a different lifetime when space travel was new had decided to go along with her husband and create a girl by devious means, now saw before her . . . the fruit of that scheme." EUGENIDES, *supra* note 1, at 519. See also *id.* at 422–23; Sandel, *supra* note 43, at 57 ("The problem lies in the hubris of the designing parents, in their drive to master the mystery of birth.").

45. See, e.g., LEE M. SILVER, REMAKING EDEN: HOW GENETIC ENGINEERING AND CLONING WILL TRANSFORM THE AMERICAN FAMILY 266–80 (1998); see also, e.g., FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION (2002); BARBARA KATZ ROTHMAN, THE BOOK OF LIFE: A PERSONAL AND ETHICAL GUIDE TO

When adolescent Cal takes charge of his own destiny, he causes us to reflect further on the meaning of parental autonomy. How many of us have learned as parents that, although the Constitution gives us the freedom to direct the upbringing of our children as against the state, our children themselves often have their own plans? How did my sons turn out to be Republicans? Despite the many interesting theoretical debates about whether parents or the state can better speak for the child,<sup>46</sup> often in real life our children speak for themselves, with an independence and resiliency that defies both parental autonomy and government control.<sup>47</sup> The challenge lies in determining how we can "bring up the child in the way [we think he or she] should go,"<sup>48</sup> while still respecting each child's autonomous self.

### C. Misguided Medics

In David's story, Dr. John Money emerges as the villain of the piece. According to Colapinto's report in *As Nature Made Him*, David's (then Bruce's) terrified parents bent over backwards to find some way to address the awful circumcision accident that had befallen their baby,<sup>49</sup> only to land in the clutches of the evil Dr. Money, a psychologist at Johns Hopkins,<sup>50</sup> who made the child a guinea pig in the ruthless pursuit of his own experimental agenda.<sup>51</sup> Money might well have proved convincing when he initially made the case that the only hope of a normal life for the penis-less boy lay in castration, reassignment, and appropriately gendered childrearing. Colapinto brings to light, however, many details that undermine Money's credibility. Most significantly, Money persistently ignored the many indications that his patient was not successfully adapting to her assigned gender.<sup>52</sup> Two other damaging details that stand out in Colapinto's exposé are Money's apparent preoccupation with all things sexual, including his insistence that the Reimer twins engage in simulated sexual conduct

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RACE, NORMALITY, AND THE IMPLICATIONS OF THE HUMAN GENOME PROJECT (2001); Sandel, *supra* note 43.

46. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (recognizing in truancy prosecution against Amish parents exception from compulsory school attendance after eighth grade); *id.* at 241–46 (Douglas, J., dissenting) (noting separate interests of Amish children); see also, e.g., Dena S. Davis, *The Child's Right to an Open Future: Yoder and Beyond*, 26 CAP. U. L. REV. 93 (1997); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937 (1996); Barbara Bennett Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992).

47. Sometimes we see evidence of such independence on the part of children in status-offense cases. See, e.g., *In re Polovchak*, 454 N.E.2d 258 (Ill. 1983); *In re Lori M.*, 496 N.Y.S.2d 940 (Fam. Ct. 1985). Of course, emancipation shows a child's independence, but eliminates the tension with parents by legally freeing the child from parental control. See, e.g., *Roe v. Doe*, 272 N.E.2d 567 (N.Y. 1971); *State v. C.R.*, 797 P.2d 459 (Utah Ct. App. 1990).

48. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

49. See COLAPINTO, *supra* note 22, at xvii (quoting David's reflections on the desperation that led his parents to Money).

50. *Id.* at 36.

51. *Id.* at 50. Indeed, this conclusion would hold even if a primary cause of David's distress turned out to be the secrecy that Money insisted was required.

52. *Id.* at 80–81.

during some of the required yearly visits to Johns Hopkins,<sup>53</sup> and an earlier paper in which Money had determined that untreated intersexed children develop in a psychologically normal way, despite their unusual genitalia.<sup>54</sup> Nonetheless, David eventually overcomes this Goliath (choosing his new name in the process),<sup>55</sup> thus discrediting Money's theories of gender. Still, Money continued to recommend the approach he had sold to the Reimers even after David resumed a male identity,<sup>56</sup> and he never issued a retraction even after David's suicide.<sup>57</sup>

Money's thinly disguised counterpart in *Middlesex* is Dr. Peter Luce.<sup>58</sup> Callie's parents take her to see Dr. Luce in New York, as adolescence begins to wreak havoc with her presumed femaleness. Although Callie's peek at Luce's written report causes pain because of the use of terminology she discovers means "monster," Luce never inflicts the harm on Callie that Money had inflicted on David.<sup>59</sup> Callie undergoes some extensive physical examinations,<sup>60</sup> but flees before having any recommended hormonal treatments or genital surgery.<sup>61</sup>

In revisiting David's story, *Middlesex* forges a less treacherous path to a "happy" ending for the central figure. After discovering the medical facts, Callie escapes from New York, decides to become Cal, and experiences wild adventures fit for a Homeric odyssey before eventually returning home to suburban Detroit. All of the challenges he encounters along the way, however, pale in comparison to the excruciating difficulties that David endured. Luce, unlike Money, never becomes the brooding presence responsible for misshaping his patient's life. Indeed, if any physician in *Middlesex*

53. *Id.* at 86–88. Money's preoccupation apparently is not unusual among those treating intersexed patients. See FAUSTO-STERLING, *supra* note 11, at 86 (describing one doctor who masturbated intersexed boys to achieve erection and invasive procedures endured by girls with genital anomalies).

54. See COLAPINTO, *supra* note 22, at 233–35. Colapinto dramatically saves this bit of information about Money's Ph.D. dissertation until close to the end of the book.

55. *Id.* at xvi, 182.

56. *Id.* at 276.

57. See Woo, *supra* note 31.

58. Colapinto has remarked on the similarity of the real and fictional "famous turtleneck-sweater-sporting sex researcher[s]" in his book and Eugenides's novel respectively. John Colapinto & Judith Shulevitz, *Middlesex*, SLATE, Sept. 17, 2002, at <http://slate.msn.com/?=2071015&entry=2071021>. No doubt, another inspiration for the fictional Dr. Luce comes from French feminist theory. See Luce Irigaray, *This Sex Which Is Not One*, in WRITING ON THE BODY: FEMALE EMBODIMENT AND FEMINIST THEORY 248, 251 (Katie Conboy, Nadia Medina, and Sarah Stanbury eds., 1997).

59. David, although castrated as a child, successfully resisted the final surgery that Money had planned, to lower the urethra and to create a vagina. COLAPINTO, *supra* note 22, at 93–96.

60. The conclusion that Callie does not suffer the harm David endured is relative; one should hardly underestimate the distress experienced by a patient who is made to feel like a medical curiosity, especially when the examinations prompt sexual arousal, shame, and discomfort. See PREVES, *supra* note 4, at 62, 73, 79 (reporting patients' experiences).

61. After Callie's escape, the reader is left knowing the error of Luce's proposed intervention. Like Money, Luce continued to publicize his patient to "prove" his theory of gender as an acquired social status that physicians and parents can choose for children. See EUGENIDES, *supra* note 1, at 479.

should bear that responsibility, it is Dr. Nishan Philobosian, a kindly family friend, who immigrated to America with Cal's grandparents and made the erroneous pronouncement at Callie's birth that the baby was a girl. However, this doctor's failing eyesight and temporary distraction (which cause his superficial inspection of the infant's genitals)<sup>62</sup> provide a striking contrast to the willful blindness that Money displays in assessing Brenda Reimer's ongoing progress. By stripping away the despair, terror, and stunning medical arrogance that pervade David's history, Cal's tale brings into focus the questions that both stories share about well-meaning parents' need to rely on experts and the experts' all-too-common errors.

The autonomy that guarantees the freedom to rear one's child also includes parental choices about medical care,<sup>63</sup> as well as education, religious training, and other important facets of upbringing. Although the Constitution entrusts such authority to parents on the theory that their natural affection will prompt them to act in the child's best interests,<sup>64</sup> what assurances do parents have when they must turn to doctors, educators, or other experts? For example, although the Supreme Court in *Parham v. J.R.* writes eloquently about the care and concern of parents who seek to admit a child to a mental institution and the mediating role played by the admitting physician's expertise,<sup>65</sup> suppose the physician makes a mistake?<sup>66</sup>

The current debate about surgical intervention for intersexed infants provides one particularly vivid illustration of the problem poignantly suggested by David's and Cal's stories. For many years, physicians treated intersex as a disease<sup>67</sup> and persuaded concerned parents of babies born with ambiguous genitalia that feminizing surgery promised the only hope for a "normal" life.<sup>68</sup> Indeed, John Money's work proved instrumental in establishing this approach, although we certainly cannot conclude that all who have implemented this standard of care behaved as wickedly as Money is portrayed in *As Nature Made Him*. Today, intersex activists have effectively challenged the conventional wisdom by calling for a moratorium on surgery until the child-patient can decide.<sup>69</sup> For some, parents and doctors had chosen the "wrong"

62. *Id.* at 216, 361.

63. The generalization covers at least conventional medical treatment sought or declined in good faith. See, e.g., *In re Phillip B.*, 156 Cal. Rptr. 48 (Cal. Ct. App. 1979). But see *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Cal. Ct. App. 1983).

64. E.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

65. *Id.* at 607-12.

66. *Parham* acknowledges but minimizes the possibility of medical error. *Id.* at 611-13.

67. See, e.g., PREVES, *supra* note 4, at 89.

68. See Beh & Diamond, *supra* note 38, at 42-58 (examining defects in parental informed consent to such procedures under prevailing standards of care); Kishka-Kamari Ford, Note, "First, Do No Harm"—*The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 YALE L. & POL'Y REV. 469, 479-88 (2001) (arguing that with no documented benefits, such surgery remains experimental, leaving parents unable to provide legal consent); see also Navarro, *supra* note 9, at 1 (examining parental dilemma). Yet this approach, designed to free the intersexed child from the stigma of being unusual, in fact imposed stigma. See PREVES, *supra* note 4, at 145.

69. See Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex*, 9 J. CLIN. ETHICS 398 (Winter 1998). New studies support this recommendation. See William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth*, 350 N. ENG. J.

gender in this irreversible surgical assignment; for others, openly living as neither a male nor a female would prove more comfortable; and for virtually all, the loss of capacity for sexual pleasure caused by the surgery demonstrates the tragic thoughtlessness of such intervention.<sup>70</sup>

Other phenomena of contemporary culture raise similar questions: when physicians and educators label a child "ADHD" and recommend Ritalin, what's a concerned parent to do?<sup>71</sup> Is a child's ability to comply with the expectations imposed by American schools so essential that resort to personality-altering drugs becomes not only a justifiable decision, but also a wise and loving one? The belated discovery of the harms to future generations caused by DES,<sup>72</sup> the noteworthy miscalculations of some physicians who went to court to compel unwilling pregnant women to deliver by Caesarian section,<sup>73</sup> and the use of radiation to treat birthmarks in ignorance of the ensuing cancer risk<sup>74</sup> all give such questions added force. The Reimers and Stephanides were not alone in turning to experts whose views, in hindsight, were misguided. When parents seek help for a child and their efforts, in fact, cause harm, parent and child alike suffer an especially painful and lasting wound.<sup>75</sup>

MED. 333 (2004); see also Claudia Kolker, *The Cutting Edge*, SLATE, June 8, 2004 at <http://www.slate.com/id/2102006> (contrasting old and new approaches).

70. See generally PREVES, *supra* note 4 (discussing interviews with intersexed adults); see also KESSLER, *supra* note 24, at 56.

71. See, e.g., THE PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 43, at 94; Sheryl Gay Stolberg, *Preschool Meds*, N.Y. TIMES, Nov. 17, 2002, § 6 (Magazine), at 59.

72. See, e.g., *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980).

73. See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (en banc); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986); see also Veronika E. B. Kolder, M.D. et al., *Court-Ordered Obstetrical Interventions*, 316 N. ENG. J. MED. 1192, 1193 (1987) (reporting suicide of husband who could not prevent forced Caesarian section on wife).

74. See, e.g., Jane Friedman, *After 50 Years, Radiation Leads to Thyroid Surgery*, WASH. POST, Oct. 5, 1999, Health Section, at Z11.

I intend here to distinguish garden-variety malpractice cases; with the examples about DES, forced Caesarians, and radiation treatment for birthmarks, an entire school of thought is later determined to be misguided.

75. See the letter from Jean Lakeman Helms, mother of an intersexed child, expressing regret that she consented to surgery for her infant:

... [T]he medical world treats intersex as a "social emergency," requiring immediate treatment through surgery, hormones and rigid secrecy. Most parents are never told to let the child know that he or she was born intersexed, or even as a member of the opposite sex!

The fear and guilt we as parents feel is made a thousand times worse by the secrecy, by the implication that our child's genitalia are so horrible that no one must ever know—especially our child.

We are urged to act quickly. We have little time to think about alternatives; all we want is for our babies to be all right, and so we sign on the dotted line.

The problem is that the typical treatment—arbitrary gender assignment, followed by genital surgery—doesn't fix the problem. In fact, for most intersex people and their families, it makes things much, much worse.

Unwanted, unconsented-to genital surgery leaves people just as different as they were before, but with less function, more pain and more shame. The scarred,

### *D. Playing the Gender Card*

Having reviewed the less prominent insights that Cal's narrative helps us identify in David Reimer's history, we can now return to the more obvious theme, the contributions of these stories to our understanding of sex and gender. Once again, David's case is presented starkly, in black and white. According to Colapinto, David was clearly and inherently a male, and nothing anyone could do would have made him female.<sup>76</sup>

Cal's story, by contrast, emerges in more telling shades of gray. Even after assuming a male identity consistent with his chromosomes, Cal wistfully notes the many ways in which he still acts and feels like a woman, particularly in the relationship he shares with his mother:

You will want to know: How did we get used to things? What happened to our memories? Did Calliope have to die in order to make room for Cal? To all these questions I offer the same truism: it's amazing what you can get used to. After I returned from San Francisco and started living as a male, my family found that, contrary to popular opinion, gender was not all that important. My change from girl to boy was far less dramatic than the distance anybody travels from infancy to adulthood. In most ways I remained the person I'd always been. Even now, though I live as a man, I remain in essential ways Tessie's daughter. I'm still the one who remembers to call her every Sunday. I'm the one she recounts her growing list of ailments to. Like any good daughter, I'll be the one to nurse her in her old age.<sup>77</sup>

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remodeled genitals don't look or work anything like the genitals most people are born with.

I wish I had known that when my daughter Emily was diagnosed.

Fundraising Appeal of the Intersex Society of North America (2003) (on file with author).

76. Compare Cal's recollections, *infra* notes 77–79 and accompanying text, with Colapinto's description of David:

[T]he strongest impression I was left with was of David's unequivocal masculinity. His gestures, walk, attitudes, tastes, vocabulary—none of them betrayed the least hint that he had been raised as a girl. And indeed, when I asked whether he thought his extraordinary childhood had given him a special insight into women, he dismissed the question. David had apparently never been a girl—not in his mind, where it counts.

COLAPINTO, *supra* note 22, at 215–16.

77. EUGENIDES, *supra* note 1, at 520–21. See also *id.* at 41–42:

I've lived more than half my life as a male, and by now everything comes naturally. When Calliope surfaces, she does so like a childhood speech impediment. Suddenly there she is again, doing a hair flip, or checking her nails. It's a little like being possessed. Callie rises up inside me, wearing my skin like a loose robe . . . . On the sidewalk I'll feel her girlish walk take over, and the movement brings back a kind of emotion, a desolate and gossipy sympathy for the girls I see coming home from school.



Rather than sharply rejecting such remnants of his past,<sup>78</sup> Cal values the “stereoscopic” vision that his double life has afforded him.<sup>79</sup> Perhaps the fictional Cal’s pacific childhood permits him to embrace his past in a way foreclosed by the brutality of David’s early experience. In any event, on the subject of gender, Cal’s story does more than bring to the surface subtextual elements of David’s history; it offers a contrasting lesson.

Significantly, Cal’s more open and nuanced retrospective look at gender is not based on any sort of *physical* ambiguity or duality. Recall that Cal is what the medical literature calls a “pseudohermaphrodite,” not a “true hermaphrodite.”<sup>80</sup> At the point in his life when he is narrating his story, he is (and, in fact, always was) physically male with XY chromosomes and testicles (though undescended), whatever the outward appearance of his genitalia. To the extent that one’s chromosomes and gonads at birth determine the sex classification,<sup>81</sup> Cal is just like David Reimer. Yet Cal’s experience emphasizes what transsexuals long have said: gender has a critical psychological component.<sup>82</sup> For Cal, this component comes from his childhood as a girl, another biographical fact he shares with David, notwithstanding David’s very different assessment of his own experience.

Eugenides has stated that the title *Middlesex* comes from the name of the street on which his family lived during part of his childhood.<sup>83</sup> It obviously has a nice ring for the name of a book about a hermaphrodite.<sup>84</sup> The title has meaning on other levels as well. In recognition of his chromosomes, hormones, and physical attraction to women (including an adolescent crush on a female classmate), Cal chooses maleness, a choice that requires him temporarily to abandon his family and to reject the medical care recommended to his parents. Because he also chooses not to repudiate his past, however, Cal leaves ample room for an understanding of gender that defies a rigid either/or paradigm and that encompasses one’s emotions, relationships, culture, and approach to the world. Even after the denouement, Cal as a man occupies a space

78. See *id.* at 479 (“I never felt out of place being a girl. I still don’t feel entirely at home among men.”).

79. In looking back on his childhood, Cal observes: “Already latent inside me, like the future 120 mph serve of a tennis prodigy, was the ability to communicate between the genders, to see not with the monovision of one sex but in the stereoscope of both.” *Id.* at 269.

80. “I’m not androgynous in the least.” *Id.* at 41. On the evolution of the categories of “male pseudohermaphrodite” and “female pseudohermaphrodite,” which rely on an understanding of “true sex” tied to gonads and significantly narrow the classification of “true hermaphrodites,” see DREGER, *supra* note 30, at 36–38.

81. Of course, these are highly contested matters, with the bases for sex classification reflecting not scientific “truth,” but social and cultural values. See *infra* Part III.A.

82. See, e.g., JENNIFER FINNEY BOYLAN, *SHE’S NOT THERE: A LIFE IN TWO GENDERS* 22 (2003). But see *In re Estate of Gardiner*, 22 P.3d 1086, 1093 (Kan. Ct. App. 2001) (considering neurological basis for gender identity disorders), *rev’d in part*, 42 P.3d 120 (Kan. 2002); William Kitchin, *The Fundamental Right To Be Free of Arbitrary Categorization: The Brain Sciences and the Issue of Sex Classification*, 42 WASHBURN L.J. 257, 266 (2003) (attributing such difference to brain function patterns).

83. See Goldstein, *supra* note 2.

84. A support group for intersexed individuals previously recognized the usefulness of the term, calling itself the Middlesex group and locating in Middlesex County, Massachusetts. See PREVES, *supra* note 4, at 139.

somewhere between male and female—in sharp contrast to the “macho” persona exhibited by David Reimer as an adult.

In addition, *Middlesex* stakes out a middle ground in the nature/nurture debate, avoiding both the position that John Money tried to establish through his “treatment” of David Reimer and the complete repudiation of this position that John Colapinto advances in *As Nature Made Him*.<sup>85</sup> As a result, Colapinto misses the mark when, in commenting on *Middlesex*, he says that he had “already written the same story, as nonfiction, three years [before].”<sup>86</sup> Although Colapinto later reconsiders this comparison,<sup>87</sup> he proceeds to take Eugenides to task for writing about a child whose intersex condition is not apparent until adolescence, so that “no family drama attends Callie’s birth and childhood.”<sup>88</sup> Yet why does Colapinto believe that noticeably ambiguous genitalia at birth and during childhood provide the gold standard for family drama about intersexuality? Certainly, Colapinto’s own book presented considerable family drama, although the Reimer family’s predicament was much more unusual than Cal’s situation and David was “normal” at birth. For both David and Cal, the real drama reaches full bloom at adolescence. In the final analysis, Colapinto’s critique overlooks all the possibilities that Cal’s 5-alpha-reductase deficiency syndrome opens for exploration, which would have been missing if Eugenides had taken Colapinto’s preferred road: Cal’s transformation and his resulting “stereoscopic” vision, his family’s adjustment to the transformation and its message about the relative insignificance of gender,<sup>89</sup> and the opportunity to highlight the important roles of *both*

85. Scholars have challenged this dichotomy. See, e.g., FAUSTO-STERLING, *supra* note 11, at 26 (noting that the ease with which debates about a biological basis for sexual orientation “evoke the nature/nurture divide is a consequence of . . . a nonsystems approach”).

David’s suicide, see *supra* note 31 and accompanying text, postdated the publication of Colapinto’s book. David’s identical twin, Brian, also committed suicide. See Woo, *supra* note 31. These facts themselves raise interesting nature-versus-nurture questions about the respective roles of any possible genetic predisposition to severe depression and the twins’ joint involvement (albeit in very different ways) in Money’s experiment. Still, it is clear that Brian’s suicide makes it impossible to conclude that David’s reassignment alone “caused” the latter’s suicide. Colapinto readily concedes that genetics likely played a part. See John Colapinto, *Gender Gap*, SLATE, at <http://www.slate.com/id/2101678> (June 3, 2004).

86. Colapinto & Shulevitz, *supra* note 58.

87. See *id.* (“And all facetiousness aside, Eugenides’s book couldn’t really be more different than mine.”).

88. *Id.* Colapinto explains:

The drama of hermaphroditism is nothing if not a *family* drama. It is a condition that sends a shock wave rocketing through the generations and one that forces each member of that family—parents and grandparents, nieces and nephews, cousins and siblings—to confront their deepest biases and beliefs about gender. Any expert in intersexuality will tell you that the birth of a sexually ambiguous child into a family strong in immigrant beliefs and background is particularly disruptive since such families often operate under comparatively rigid, traditional notions about the roles of men and women . . .

*Id.* (emphasis in original).

89. See *supra* text accompanying note 77.

nature and nurture.<sup>90</sup> For the most part, I like *Middlesex* just the way Eugenides wrote it.

Yet do any of these positive features of *Middlesex* satisfactorily explain why Eugenides has Callie choose to become Cal, that is, to trade a female for a male identity? Instead, Callie could have decided to remain female (with or without anatomical "correction") or, alternatively, to live outside traditional gender boundaries altogether.<sup>91</sup> What does the story's conclusion teach us? I see in Cal's choice the irresistible pull of privilege. Becoming a straight male allows Cal to move to the very top of the gender hierarchy.<sup>92</sup> If a character whose understanding of gender is as multifaceted and capacious as Cal's cannot resist making this move, then how could anyone have expected David Reimer not to feel especially aggrieved about his loss, through deception, of his birthright—the superior status, maleness, that he felt belonged to him?<sup>93</sup>

Cal's story thus helps us to find new meanings in David's. Yet perhaps the important question transcends both of these individuals, whose extraordinary lives make the ordinary implications easy to overlook. Would every adolescent girl, if given the choice, become male? My own experience tells me no, and, of course, the chosen reassignment of male-to-female transsexuals shows that some forces trump privilege.<sup>94</sup> Nonetheless, the persistence of the gender hierarchy and the troubling evidence of adolescent girls' depression<sup>95</sup> make the hypothesis worth pondering, especially as we consider the role law might play.

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90. Of course, the plot that Colapinto prefers also would have missed the creative twist that Eugenides brings to the problems of family secrecy, parental control, and reliance on fallible experts. See *supra* notes 34–75 and accompanying text.

91. True, Cal (then Callie) probably understood that the genital surgery proposed by Dr. Luce might have impaired a part of her body—her "blooming crocus"—that had recently brought her pleasure. See EUGENIDES, *supra* note 1, at 432–39; see also *supra* text accompanying note 5. Still, becoming a male could not have been the only way to avoid the surgery.

92. Anne Fausto-Sterling reports that most intersexed youths, when offered some choice, have opted to become male—in our own culture and others as well. FAUSTO-STERLING, *supra* note 11, at 43, 95, 109.

93. See COLAPINTO, *supra* note 22, at 262–63, 265; see also Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80, 90 (Wendy Brown & Janet Halley eds., 2002) (reviewing Catharine MacKinnon's Brief of Amici Curiae National Organization on Male Sexual Victimization, Inc., *Oncle v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (1997 WL 471814), in a male-male sexual harassment case, emphasizing that plaintiff's "primary, definitional injury is the loss of masculine superordination").

94. In the analogous context of the racial hierarchy, there are notable examples of those who could "pass" as white but have chosen to identify as African-American. See, e.g., JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* (1995); GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995). I am in no position to generalize here, and gender privilege and race privilege might not operate analogously at all. Indeed, Williams's memoir presents a fascinating story of "transformation" from one identity to another with which to compare Cal's. On the harms of "passing" and similar assimilationist efforts, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

95. See, e.g., MARY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS* (1994).

## III. THROUGH THE LEGAL LOOKING GLASS

In our society (and others as well), gender- and sex-based classifications have formed the building blocks of hierarchy.<sup>96</sup> To the extent that law either reinforces or attempts to reject these classifications and the resulting inequalities, sex and gender differences become legal issues.<sup>97</sup>

Before considering the implications that Cal and his cohort might have for such legal issues, some preparatory housekeeping becomes necessary. To set the stage, foundational material follows, including a digression on the terms used to discuss transgender issues and the way medicine has shaped this discussion, a review of relevant legal precedents and rules, and a look at particular questions of sex and gender that the law has been asked to address recently. Then, we can return to the contributions of Cal and his story.

## A. Transgender Terminology

## 1. Male and Female: Sex, Gender, Sexuality, and Sex Roles

Given the way we ordinarily take “male” and “female” categories for granted, choosing the best terminology proves difficult or at least requires some clarification. These are first-order issues. Even progressive gender politics, such as the struggles for women’s equality and gay rights,<sup>98</sup> typically assume a threshold ability to identify males and females (queer theorists’ resistance to such categories notwithstanding<sup>99</sup>). A similar assumption certainly underlies the position of those who cling to more traditional roles for males and females<sup>100</sup> and who would discriminate against gays and lesbians (as reflected in the military’s “Don’t Ask, Don’t Tell” policy, for example<sup>101</sup>) or would criminalize all same-sex sexual conduct (as reflected in the law challenged, successfully, in *Lawrence v. Texas*<sup>102</sup>).

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96. See, e.g., Valdes, *supra* note 11, at 266–67 (reviewing “pecking orders”).

97. Of course, one could talk about religion, for example, as well as law, as a system that shares a dynamic relationship with sex and gender classifications. See Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and the World (July 31, 2004) [hereinafter Letter to Bishops] (available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html)) (last visited Feb. 19, 2005) (critiquing, inter alia, feminists’ emphasis on subordination and “gender,” minimization of physical difference, and “new model of polymorphous sexuality”).

98. Note, however, that the so-called gay rights movement now typically seeks to ensure legal protection for persons with a range of “nontraditional” sexual identities and sexualities, usually under the banner of “GLBT,” for gay, lesbian, bisexual, and transgendered persons. See, e.g., PREVES, *supra* note 4, at 88, 149.

99. See, e.g., Halley, *supra* note 93, at 82, 94–96.

100. See, e.g., Letter to the Bishops, *supra* note 97.

101. 10 U.S.C. §654 (2000).

102. 539 U.S. 558 (2003).

"Male" and "female" are used to refer to both "sex" and "gender." Although uses of "sex" and "gender" in law and society often seem interchangeable,<sup>103</sup> Alice Domurat Dreger helpfully explains that "sex" is usually "considered a strictly anatomical category" while "gender" is "used as a category of self—and/or social identification."<sup>104</sup> Others push this understanding further by emphasizing gender's performative character, with the conclusion that "being" male or female simply entails engaging in a collection of acts and self-presentations.<sup>105</sup>

As Dreger elaborates, definitions of "male" and "female" are contextual, "specific to time and place."<sup>106</sup> Her book, *Hermaphrodites and the Medical Invention of Sex*, examines the efforts of "medical men" in France and England during the late nineteenth and early twentieth centuries to resolve the status, as male or female, of those who presented ambiguous or incongruous physical characteristics. Emphasizing the cultural discomfort with ambiguity and the need to have one "sex" applied to each body,<sup>107</sup> Dreger traces the evolution of tests and criteria designed to allow virtually everyone to be labeled either male or female; in the process, Dreger shows how the medical profession decided the social meaning of these categories. Writing before and after Dreger, other scholars, including Judith Butler, Suzanne Kessler, and Anne Fausto-Sterling, have made similar points about our socially constructed understandings of even the most physical indicia of sex.<sup>108</sup>

As the references from today's popular culture indicate, challenges to the traditional categories come from two main sources: transsexuals (those whose self-identity and physical sex diverge, at least until reassignment surgery)<sup>109</sup> and intersexed

103. See Valdes, *supra* note 11, at 134, 325; see also JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 4–5 (1993) [hereinafter BUTLER, BODIES THAT MATTER] (noting how gender tends to absorb sex); *id.* at 28 (challenging the presumption that sex is "the irreducible point of departure" for gender); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE]; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2–3 (1995); Taylor Flynn, *Essay, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 416 (2001) (transgender rights cases "provide a means of disentangling gender from anatomy"); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995).

104. DREGER, *supra* note 30, at 10.

105. See BUTLER, GENDER TROUBLE, *supra* note 103, at 24–25.

106. DREGER, *supra* note 30, at 10. For example, even with a focus on biological attributes alone, one could not consider chromosomes until the development of a test for them. See also BUTLER, *supra* note 32, at 15–16, 210 (emphasizing external, contextual gender norms).

107. See *id.* at 107–09, 153.

108. See BUTLER, BODIES THAT MATTER, *supra* note 103; FAUSTO-STERLING, *supra* note 11; KESSLER, *supra* note 24; see also Yoshino, *supra* note 94, at 865–71 (interpreting Butler's "performativity"). For Judith Butler's most recent examination of these issues, see generally BUTLER, *supra* note 32.

109. Estimates of the number of transsexuals in the United States range from a low of 3000 to a high of 60,000. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 289 & n.161 (1999); see

individuals<sup>110</sup> (those who are born with ambiguous genitalia or unusual chromosomal or gonadal composition or who have a physical condition, such as androgen insensitivity syndrome, resulting in an outward appearance inconsistent with chromosomal sex).<sup>111</sup> Although some use “transgendered” in a narrow sense to refer only to transsexuals, in today’s common parlance the term has a more expansive meaning that also includes intersexed individuals, as in the names of many different “GLBT” (gay, lesbian, bisexual, and transgendered) advocacy and support groups.<sup>112</sup>

Applying these terms, those who seek sex reassignment surgery are generally called transsexuals or transgendered individuals.<sup>113</sup> David Reimer probably belonged under one of these headings during the period when he was being reared as Brenda, although his problems were imposed upon him by others, not his own physical or even emotional attributes. Cal’s 5-alpha-reductase deficiency syndrome makes him intersexed because he appeared anatomically female during childhood, although he was chromosomally and gonadally male. But young Callie also could fit the transsexual category to the extent she was (albeit unknowingly) a male living as (occupying the apparent body of?) a female, and so could Cal, a male who had previously lived as a female. As these applications show, the attempt to categorize here presents as many difficulties as the more basic attempt to label everyone as male or female—again putting in play the underlying meaning of the terms themselves.

Although transsexuals and intersexed persons arguably complicate the ordinary concepts of sex and gender in different ways, in the final analysis both demonstrate that multiple factors contribute to “maleness” and “femaleness”—inviting the possibility that one person might have attributes from both categories and defying an immutable either/or approach to classification. Perhaps it is helpful to imagine here one continuum or axis for sex and another for gender, with male and female each at one end of each continuum but with intermediate places for those who do not belong at either extreme.<sup>114</sup>

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also Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 *LAW & SEXUALITY* 87, 88 n.6 (2003) (reporting that in Europe about one in 30,000 adult males and one in 100,000 adult females seek sex-reassignment surgery).

110. On the use of “intersexed” versus “intersexual,” see Kessler, *supra* note 24, at 85.

111. One study estimates the frequency of intersex to be approximately 2% of live births. Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *AM. J. HUM. BIOLOGY* 151, 161 (2000).

112. See *supra* note 98 (citing PREVES, *supra* note 4 at 88, 149); see also BUTLER, *supra* note 32, at 6–7, 217, 219 (explaining how “intersex and transsex” challenge “natural dimorphism”); Flynn, *supra* note 103, at 392 (“‘transgender’ . . . applies to persons whose appearance, behavior, or other personal characteristics differ from traditional gender norms”).

113. In a book that has evoked enormous controversy, J. Michael Bailey posits two types of transsexuals: homosexual (“extremely feminine gay men”) and autogynephilic (“men erotically obsessed with the image of themselves as women”). BAILEY, *supra* note 9, at 146. See also Robert Becker, *NU Investigates Charges over Book; No Consent to Use Stories, Critics Say*, CHI. TRIB., Nov. 18, 2003, § 1, at 2; Robin Wilson, *Dr. Sex: A Human-Sexuality Expert Creates Controversy with a New Book on Gay Men and Transsexuals*, CHRON. HIGHER EDUC., June 20, 2003, at A8.

114. See, e.g., SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL EQUALITY* (1993); see also FAUSTO-STERLING, *supra* note 11, at 78 (suggesting recognition of five sexes); Greenberg, *supra* note 109, at 275 (rejecting binary view because “sex and gender range across a spectrum”). Some cultures have additional categories for

Yet sex and gender do not represent the only axes to contemplate. As Francisco Valdes underscores, sexuality provides another relevant reference, although western law and society habitually conflate these three variables.<sup>115</sup> So long as homosexuality remains deviant, part of the basic understanding of "male" entails sexual attraction to females and vice versa.<sup>116</sup> This was certainly true in the historical period Dreger examines, and she theorizes that homophobia explains the apparent medical necessity of finding each person's "true sex."<sup>117</sup> She recounts how the abhorrence of homosexuality prompted several doctors to disrupt their patients' lives by assigning a new sex even after adulthood and marriage in an effort to halt improper sexual unions.<sup>118</sup>

Finally, beyond sex, gender, and sexuality, lie gender roles. This axis or continuum merits separate consideration because, here, it seems that the law has developed the greatest comfort with ambiguity and the freedom to defy traditional categories.<sup>119</sup> As shown below, the Supreme Court and other lawmakers have exploded traditional gender roles, facilitating the movement of both males and females along this particular continuum,<sup>120</sup> regardless of anatomy, chromosomes, self-presentation, performance, or sexual orientation.<sup>121</sup> That is to say, roles traditionally assigned to men or to women are now open to anyone. Nonetheless, the implications that might follow from such law

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a third sex or a third gender. For example, Greenberg writes about children from the Dominican Republic and New Guinea with the developmental pattern that Cal experienced. Their cultures have special names for them, avoiding the necessity for them to fit a male or female classification. *Id.* at 276. *But see* FAUSTO-STERLING, *supra* note 11, at 109 ("While these cultures know that sometimes a third type of child is born, they nevertheless recognize only two gender roles."). *Cf.* BAILEY, *supra* note 9, at 144 (rejecting "an either-or label" for transsexuality in favor of a continuum).

115. *See generally* Valdes, *supra* note 11; *see also* Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 GEO. MASON U. CIV. RTS. L.J. 1, 9 (1998) (summarizing Valdes, *supra* note 11, who contends that the conflation of sex, gender, and sexual orientation in American law and society "not only molds everyone subject to it into 'correct' sex and gender roles, it also creates and perpetuates an ideology [of] 'hetero-patriarchy,' which privileges male/masculinity over female/femininity").

116. DREGER, *supra* note 30, at 135–36. *See id.* at 153; *see also* BUTLER, *supra* note 32, at 54, 181–85 (examining gender versus sexuality); Halley, *supra* note 93, at 91 (citing Catherine MacKinnon); KESSLER, *supra* note 24, at 106 (citing Anne Fausto-Sterling); PREVES, *supra* note 4, at 17 (citing Judith Butler). Again, however, a continuum, rather than clearly defined categorization, no doubt offers a more accurate way to think about sexual behavior. *See, e.g.,* William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333, 361 (1992).

117. *See* DREGER, *supra* note 30, at 8–9; *see also id.* at 31, 76, 88.

118. *See id.* at 110–13, 119–20.

119. Adding another wrinkle to the nature/nurture debate, Fausto-Sterling notes that some scientists believe that biology might play a larger role in the development of gender roles and sexual orientation than it plays in the development of gender identity. FAUSTO-STERLING, *supra* note 11, at 71.

120. As Fausto-Sterling notes, this legal trend shares a theoretical kinship with Money's work. "Paradoxically, theories of medical treatment of intersexuality undermine beliefs about the biological inevitability of contemporary sex roles. Theorists such as Money suggest that under certain circumstances the body is irrelevant for the creation of conventional masculinity and femininity." *Id.* at 76.

121. *See infra* notes 143–58 and accompanying text.

reforms remain open for debate: across-the-board legal recognition of one's own choice of gender identity; blurred gender lines; or the repudiation of all sex, gender, and sexuality categories.<sup>122</sup>

## 2. Male Norms and Female "Defaults"

Labels and other forms of expression help construct the way we see the world. One frequent critique of the law points out the male norm that provides the underlying assumptions for many legal rules. This norm reflects and reinforces the gender hierarchy. To cite one illustration, Wendy Williams has condemned the Supreme Court's approach to pregnancy discrimination exemplified in *Geduldig v. Aiello*<sup>123</sup> and *General Electric Company v. Gilbert*.<sup>124</sup> In both cases, the Court upheld an insurance plan that covered all disabilities except pregnancy, on the theory that the exclusion of this one "additional risk, unique to women" did not represent sex-based discrimination.<sup>125</sup> Williams writes that the Court's reasoning "makes breathtakingly explicit the underlying philosophy of the majority of the justices in *Geduldig* and *Gilbert*. Pregnancy . . . is an 'extra,' an add-on to the basic male model for humanity."<sup>126</sup> Legal scholars have criticized the male norm in examining many other problems, including tort law's reluctance to compensate for emotional injuries,<sup>127</sup> the Internal Revenue Code's failure to tax housework,<sup>128</sup> and the doctrine of family privacy.<sup>129</sup>

Against this background of a legal male norm, the medical description of the female body as the "default" model stands out as quite striking. In explaining how embryonic sex differentiation occurs, medical authorities state that the action of masculinizing hormones on the default embryo creates a normal male.<sup>130</sup> In the absence of such

122. Queer theorists would urge this last outcome. See *supra* note 99 and accompanying text. But see Case, *supra* note 103, at 75.

123. 417 U.S. 484 (1974).

124. 429 U.S. 125 (1976).

125. *Id.* at 139 (emphasis omitted).

126. Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 345-46 (1984-1985). Congress later rejected the Court's analysis by enacting the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (2000).

127. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

128. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

129. See, e.g., Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328 (David Kairys ed., 1998); see also Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627 (1987); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991).

130. See, e.g., FAUSTO-STERLING, *supra* note 11, at 202-05; see also PREVES, *supra* note 4, at 23-26 (explaining process in simple terms, with illustrations). Interestingly, early religious understandings of reproduction placed the point of "animation" or "ensoulment" at forty days after conception for males and eighty days for females. See, e.g., *Roe v. Wade*, 410 U.S. 113, 133-34 & n.22, 160 (1973); see also Franke, *supra* note 103, at 72 (noting pre-Enlightenment views of perfection of the male body).



hormones or in situations in which sensitivity to such hormones is impaired, the embryo remains in the default, or female, status—or at least appears to do so. The brain of a male embryo, denied exposure to masculinizing hormones, will retain its default or female status according to one explanation for some forms of transsexualism.<sup>131</sup>

What does such terminology communicate about our understanding of the gender hierarchy? Does it suggest a female norm or baseline, in contrast to the male norm that scholars have found in many legal principles? Under this interpretation, is it possible, to paraphrase Wendy Williams, that masculinization represents “an add-on to the basic [fe]male model for humanity?” Alternatively, does the notion of the female as the default model simply reflect and reinforce the existing males-first hierarchy? From this perspective, women are defined by the absence of something that men have, not affirmatively by their own special characteristics.<sup>132</sup> Correspondingly, men have something special—whether testicles, chromosomes, or hormones—that women lack.

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131. See *In re Heilig*, 816 A.2d 68, 77 (Md. 2003) (quoting William Reiner, *To Be Male or Female—That is the Question*, 151 ARCHIVES PED. & ADOLESCENT MED. 224, 225 (1997)):

The studies imply that transsexualism may be more similar to other physiological conditions of sexual ambiguity, such as androgen insensitivity syndrome, than to purely psychological disorders. Reiner posits:

“What can be stated is that the absence of prenatal androgen exposure, whether a child is XX, XO, has androgen insensitivity syndrome, and so on, may render the brain to the default, or female, position. Within the potential for transformation from the default brain to the virilized brain is the opportunity for errors of incomplete or improperly timed androgen exposure. Such errors, in addition to acquired, sometimes iatrogenic, post-natal injuries . . . may lead to the misassignment or reassignment of sex at birth from the genetic sex.”

See also *In re Estate of Gardiner*, 22 P.3d 1086, 1093 (Kan. Ct. App. 2001) (citing brain studies showing the neurobiological basis for gender identity disorders), *rev'd in part*, 42 P.3d 120 (Kan.), *cert. denied*, 537 U.S. 825 (2002). Cf. COLAPINTO, *supra* note 22, at 44–45 (describing Diamond’s theories of prenatal hormones and gender identity); *id.* at 66, 134 (describing Money’s views of prenatal hormones and gender identity). On theories about prenatal hormone exposure and sexual behavior, see FAUSTO-STERLING, *supra* note 11, at 213–14, 218, 227–28. On the role of genes in intersex conditions, see David T. MacLaughlin & Patricia K. Donahoe, *Sex Determination and Differentiation*, 350 N. ENG. J. MED. 367 (2004).

132. See BUTLER, *BODIES THAT MATTER*, *supra* note 103, at 104 (“a lack . . . designates absently the domain of the feminine”); DREGER, *supra* note 30, at 34, 68–69 (describing females as underdeveloped males), 184 (vaginas as the absence of something); FAUSTO-STERLING, *supra* note 11, at 203 (“longstanding notion that femaleness represented a bodily absence, while a physical presence defined maleness”); Irigaray, *supra* note 58, at 251 (“[Woman’s] sexual organ, which is not one organ, is counted as none. The negative, the underside, the reverse of the only visible and morphologically designatable organ . . . the penis.”).

How can we avoid recalling here Freud's penis envy<sup>133</sup> or, to invoke a different hierarchy, the racial purity required of whites under the old "one-drop" rule?<sup>134</sup>

This alternative interpretation, reflecting male superiority, seems to animate standard medical protocols for children born with ambiguous genitalia. Even those who are born chromosomal males will be assigned a female label if they lack genitalia deemed adequate for a socially acceptable penis. Indeed, Suzanne Kessler unmasks John Money's focus on genitalia, notwithstanding the use of his theory by social constructionists.<sup>135</sup> In other words, for all the emphasis that Money placed on "gender plasticity,"<sup>136</sup> he recommended female assignments only for males deemed to have inadequate penises. To make this point less abstractly, note that Money did not recommend reassignment for twin Brian Reimer, whose penis remained intact.

For males with ambiguous genitalia, as Alice Domurat Dreger explains:

[S]urgeons refashion phalluses to look like clitorises (or at least to be invisible when the individual is standing), build vulvas and vaginas if necessary, and remove any testes. This is done even if it means risking a child's only real chance at becoming a biological parent, because intersex doctors consider "adequate" penises [at least 2.5 centimeters when stretched] far more important for boys than potential fertility. These children often also receive "feminizing" hormonal supplements and later breast implants to accentuate feminine development . . . .<sup>137</sup>

Dreger continues with a description of the standard medical practice in the mirror-image case:

Meanwhile, genetic females (that is, babies lacking a Y chromosome) born with ambiguous genitalia are declared girls—no matter how masculine their genitalia look. This is done chiefly in the interest of preserving these children's feminine reproductive capabilities and in bringing their anatomical appearance and physiological capabilities into line with that reproductive role. Consequently, these children are reconstructed to look female using the same general techniques as those used on genetic-XY children assigned a female role. Surgeons reduce "enlarged clitorises" . . . so that they will not look or act "masculine." Vaginas are built or lengthened if necessary, in order to make them big enough to accept

133. See, e.g., NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* 52–53, 108 (1989) (summarizing Freud on penis envy); see also BUTLER, *BODIES THAT MATTER*, *supra* note 103, at 200 (quoting Freud on penis envy).

134. See, e.g., HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 74 (1995); IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 118 (1996). Cf. Franke, *supra* note 103, at 26–29 (comparing race and sex differentiation).

135. KESSLER, *supra* note 24, at 25. But see *supra* note 120 (quoting Fausto-Sterling).

136. See *supra* note 24 and accompanying text.

137. DREGER, *supra* note 30, at 182; see also FAUSTO-STERLING, *supra* note 11, at 57; KESSLER, *supra* note 24, at 20, 27, 37 (quoting physicians and describing their assumptions); cf. PREVES, *supra* note at 4, at 139 (reproducing the Intersex Society of North America's ("ISNA") "phall-o-meter"). But see DREGER, *supra* note 30, at 195 (reporting that two physicians disagree with this practice). Only now are physicians beginning to gather data to evaluate the standard interventions, and their findings raise grave doubts about the practices that Dreger describes. See Reiner & Gearhart, *supra* note 69; see also Navarro, *supra* note 9, at 1.

average-sized penises. Joined labia are separated, and various other surgical and hormonal treatments are directed at producing a believable and, it is hoped, fertile girl. Clitorises—meaning phalluses in children assigned female identities—are considered too big if they exceed one centimeter (0.39 inches) in length . . . .<sup>138</sup>

Although no doubt physicians find surgical reduction more easily accomplished than surgical construction,<sup>139</sup> still the underlying assumptions send a strong signal that the “female default” does not reflect a female norm. To the contrary, while anyone apparently can be a female, maleness remains an elite assignment reserved for those who meet anatomical criteria specified by the medical profession.<sup>140</sup>

Law professor Julie A. Greenberg puts the point somewhat differently, citing such medical practices to conclude that sex—no less than gender—can be viewed as a social construct, not a biological fact: “[M]en are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate.”<sup>141</sup> Biologist Anne Fausto-Sterling goes further: “Our bodies are too complex to provide clear-cut answers about sexual difference.”<sup>142</sup>

### B. Equality Doctrine

Although the appropriate place for gender differences in both law and society remains contested, the Supreme Court’s constitutional jurisprudence makes one point undisputably clear: laws that rely on gender-based stereotypes presumptively violate the Equal Protection Clause and related equality norms. Repeatedly, a majority of the Court has condemned the use of such stereotypes. In doing so, the Court has eviscerated the legitimacy of all gender roles.

Most recently, in *Nevada Department of Human Resources v. Hibbs*,<sup>143</sup> the majority upheld the application to the states of the remedial provisions of the Family and Medical Leave Act (“FMLA”), noting with approval how Congress enacted the statute to address the states’ reliance on “invalid gender stereotypes in the employment context.”<sup>144</sup> With this understanding of the FMLA as an antidiscrimination measure, the majority cited its own use of heightened scrutiny for gender classifications as a parallel move; this standard of review disallows justifications for such classifications based on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>145</sup> In particular, the *Hibbs* Court identified the harmful workplace consequences of gender stereotyping for both women and men:

138. DREGER, *supra* note 30, at 182–83; see FAUSTO-STERLING, *supra* note 11, at 61; Ford, *supra* note 68, at 470–74.

139. See DREGER, *supra* note 30, at 18, 183; KESSLER, *supra* note 24, at 50; PREVES, *supra* note 4, at 56.

140. But see DREGER, *supra* note 30, at 117 (noting previous practice of treating doubtful cases as males to prevent danger of giving “masked males” access to females).

141. Greenberg, *supra* note 109, at 272.

142. FAUSTO-STERLING, *supra* note 11, at 4; see *id.* at 3–6.

143. 538 U.S. 721 (2003).

144. *Id.* at 730; see *id.* at 728 (“The FMLA aims to protect the right to be free from gender-based discrimination in the workplace.”).

145. *Id.* at 729 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

diminished chances for success in employment for the former and rare opportunities for family leaves for the latter.<sup>146</sup>

The Court previously invoked this general approach to invalidate numerous specific gender-based stereotypes that traditional family law followed. For example, using this anti-stereotyping analysis, the Court found equal protection violations in rules that specified who might need alimony (former wives only),<sup>147</sup> who needs education and training to perform the provider role (young men only),<sup>148</sup> who can manage community property (husbands only),<sup>149</sup> and who will be caring for a child after the other parent dies (mothers only).<sup>150</sup> Although male plaintiffs prevailed in many of these challenges,<sup>151</sup> overall this line of cases worked to dismantle a caste system that had relegated women to a secondary status in society.<sup>152</sup>

As these cases demonstrate, the Court has pushed its anti-stereotyping analysis into family law, the realm in which gender-based role assignments have perhaps remained most deeply entrenched.<sup>153</sup> Developments in state and federal statutes and case law have followed suit, as we can see in the emergence of gender-neutral rules about child custody,<sup>154</sup> post-dissolution support,<sup>155</sup> premarital contract enforcement,<sup>156</sup> and age requirements for marriage,<sup>157</sup> to name just a few illustrations. Similarly, the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations*, the latest word in family-law reform, follows a gender-neutral

146. *Id.* at 736.

147. *Orr v. Orr*, 440 U.S. 268 (1979).

148. *Stanton v. Stanton*, 421 U.S. 7 (1975); see Jessie Bernard, *The Good-Provider Role: Its Rise and Fall*, 36 AM. PSYCHOL. 2 (Jan. 1981).

149. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

150. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanley v. Illinois*, 405 U.S. 645 (1972).

151. See *Orr*, 440 U.S. at 271; *Weisenfeld*, 420 U.S. at 638; *Stanley*, 405 U.S. at 657; see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (challenging successfully the constitutionality of an all-women's nursing school); *Craig v. Boren*, 429 U.S. 190 (1976) (challenging successfully the constitutionality of a higher drinking age for males than for females).

152. Cf., e.g., Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988); Valdes, *supra* note 11, at 266-67. Blackstone's *Commentaries* provides one often-cited source documenting the subordinated status of married women. 1 WILLIAM BLACKSTONE, COMMENTARIES \*442.

153. The Court has accomplished this change in family law even while eschewing strict scrutiny of gender classifications in favor of the less demanding and less predictable intermediate scrutiny. See generally Lee Epstein et al., *Constitutional Sex Discrimination*, 1 TENN. J.L. & POL'Y 11 (2004), available at <http://www.law.utk.edu/students/tjlp/tjlphone.htm>.

154. See, e.g., *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981); MO. REV. STAT. § 452.375 (2003).

155. See generally, e.g., Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000).

156. See, e.g., *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990).

157. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 203, 9A U.L.A. 180 (1998).

approach in proposing how legal decisionmakers should treat the consequences of family breakups in the absence of agreement by the parties.<sup>158</sup>

According to the Supreme Court's approach, only a narrow band for departures from gender neutrality exists; these exceptions cover only those cases in which men and women are not similarly situated, based on "real differences."<sup>159</sup> Yet as the FMLA itself indicates, today lawmakers might choose a gender-neutral scheme *even when* sex-based biological differences (as distinguished from stereotypical notions)<sup>160</sup> would permit an exception. In the FMLA context, for example, Congress might well have rationalized that pregnancy and childbirth, which give rise to the need of some female employees (but no male employees) for a specific type of leave, demand additional protection, beyond that offered for other leaves needed by male and female employees alike.<sup>161</sup> Nonetheless, Congress enacted a gender-neutral leave law, explaining the policy reason for this choice—fighting discrimination—in the statute itself.<sup>162</sup>

### C. Same-Sex Marriage

#### 1. Applying Anti-Stereotyping Analysis

Although the Supreme Court has overturned almost all rules prescribing different family responsibilities and expectations for wives and husbands, and mothers and fathers, only a few judges have explicitly considered the ultimate conclusion of this anti-stereotyping analysis: whether it undermines the requirement of a man and a woman for a valid marriage.<sup>163</sup> In other words, if both males and females alike must be free to assume the various family roles, then what is the rationale for requiring one man and one woman for a valid marriage?

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158. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 12, 24 (2002).

159. *Michael M. v. Superior Ct.*, 450 U.S. 464, 469 (1981) (stating that the Court upholds gender classifications that "realistically reflect[] the fact that the sexes are not similarly situated in certain circumstances"); see, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Lehr v. Robertson*, 463 U.S. 248 (1983); see also *Mary Anne Case*, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000); cf. David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1002 (2002) (exploring the Court's ongoing use of "real differences" doctrine).

160. Lawmakers do not always see the distinction. See *Sylvia Law, Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987–1002 (1984); see also Franke, *supra* note 103, at 29–30, 81–82.

161. Cf. *Cal. Fed.*, 479 U.S. 272 (upholding against sex-discrimination challenge a statute providing unpaid pregnancy disability leave and reinstatement).

162. 29 U.S.C. § 2601(a) (2000).

163. Of course, the Supreme Court itself has not directly considered this issue although *Lawrence v. Texas*, 539 U.S. 558 (2003), contains relevant dicta, with both the majority and concurring Justice O'Connor stating that their respective due process and equal protection rationales for invalidating criminal same-sex sodomy statutes do not reach the marriage issue and Justice Scalia condemning this new precedent for supporting a right to same-sex marriage. See *id.* at 578 (majority opinion); *id.* at 585 (O'Connor, J., concurring); *id.* at 590, 599–600 (Scalia, J., dissenting).

This question follows so ineluctably from the Supreme Court's gender-equality jurisprudence that one can wonder with well-founded surprise why this question has played such an insignificant part in the otherwise expansive same-sex marriage debate.<sup>164</sup> Yet, certainly the requirement rests on stereotypes (whether such stereotypes are invoked to define marriage or assume its purpose) that limit the role of wife to women and that of husband to men—and in so doing perpetuate the gender hierarchy that the Supreme Court's anti-stereotyping analysis has sought to undo. Sylvia Law<sup>165</sup> and Andrew Koppelman<sup>166</sup> have elegantly developed this line of reasoning, which others have examined as well.<sup>167</sup>

Notwithstanding the stunning victory for challengers of the male-female marriage requirement in the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*<sup>168</sup> and their qualified success in the highest courts in Hawaii<sup>169</sup> and Vermont,<sup>170</sup> only one judge (on the Vermont court) fully articulates this

164. See generally Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. \_\_\_\_ (2005) (forthcoming).

165. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

166. ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 53–71 (2002) [hereinafter KOPPELMAN, *THE GAY RIGHTS QUESTION*]; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination*]; Koppelman, *supra* note 152. In focusing on sex discrimination, Koppelman and Law revived an argument that some activists had advanced much earlier. KOPPELMAN, *THE GAY RIGHTS QUESTION*, *supra*, at 54, 169 n.4.

167. E.g., John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605 (2004); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); see also Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 193 (2003) ("the state should not craft its law of marriage to force individuals into a gender script—for instance, decreeing that a man may marry only a woman and a woman may marry only a man"); Case, *supra* note 159, at 1486–90; Amelia A. Craig, *Musing About Discrimination Based on Sex and Sexual Orientation as "Gender Role" Discrimination*, 5 S. CAL. REV. L. & WOMEN'S STUD. 105 (1995); Eskridge, *supra* note 116, at 341; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 515, 617–26 (1992).

168. 798 N.E.2d 941 (Mass. 2003). The majority determined that excluding from civil marriage and its benefits those who choose same-sex spouses violates the state constitution's guarantees of liberty and equality, because the exclusion lacks a rational basis. The court left room for more restrictive understandings of marriage under religious doctrines and practices. *Id.* at 965 n.29.

169. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion). The plurality saw the restriction as sex-based on its face because a marriage-license applicant's sex and the sex of the prospective spouse determine their eligibility. I deem the case a "qualified success" because the court remanded the case so that the state could attempt to establish a compelling state interest, as required by the state constitution's equal rights amendment. See *Baehr v. Miiike*, 994 P.2d 566 (Haw. 1999) (appeal after remand). The case triggered a public referendum that produced a constitutional amendment authorizing the legislature to limit marriage to a man and a woman, however, and the legislature did just that. See Haw. Const. art. I, § 23. The earlier decision was then reversed as moot. *Baehr v. Miiike*, 1999 Haw. LEXIS 391.

anti-stereotyping analysis<sup>171</sup> and one other (concurring in *Goodridge*) uses it.<sup>172</sup> This is so even though the United States Supreme Court's invalidation of antimiscegenation laws in *Loving v. Virginia*<sup>173</sup> provides a useful template for this approach,<sup>174</sup> the first of the recent state cases, *Baehr v. Lewin* from Hawaii, explicitly relied on a facial sex discrimination rationale;<sup>175</sup> and Massachusetts's constitution, like Hawaii's, expressly prohibits sex discrimination.<sup>176</sup>

Yet, a closer look reveals a more sophisticated and nuanced version of the anti-stereotyping analysis in some of these recent developments.<sup>177</sup> In effect, the Vermont case, *Baker v. State*, recognizes that the traditional restriction on marrying discriminates against gays and lesbians as a class by denying them the equal access to marriage's benefits promised by the state constitution's Common Benefits Clause.<sup>178</sup> Similarly, the *Goodridge* majority pointedly acknowledges the second-class status that the marriage restriction (even if ameliorated by access to civil unions) imposes on gays and lesbians.<sup>179</sup> And in *Lawrence v. Texas*,<sup>180</sup> the United States Supreme Court's

170. *Baker v. State*, 744 A.2d 864 (Vt. 1999). I deem this case a "qualified success" because it authorized civil unions, rather than access to full marriage, as a remedy for the discrimination.

171. *Id.* at 906-07 & n.11 (Johnson, J., dissenting in part). Justice Johnson sees the issue as one of sex discrimination on its face and goes on to emphasize stereotypical gender roles. *But see id.* at 880 n.13 (majority rejects this analysis because of the absence of purposeful sex and gender-role discrimination).

172. *Goodridge*, 798 N.E.2d at 973 (Greaney, J., concurring) (noting that this case requires confronting "ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage"). Justice Greaney sees the issue as one of sex discrimination on its face.

173. 388 U.S. 1 (1967).

174. In particular, *Loving* rejected the state's claim that there was no discrimination because blacks and whites alike were prohibited from marrying across racial lines. The Court first condemned the racial classification itself as a violation of equal protection. *Id.* at 8-9. The *Loving* Court then went on to consider the law's illegitimate purpose, the maintenance of white supremacy. *Id.* at 11; *see also* *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (noting that racial classifications themselves are suspect and must meet highest scrutiny, even if they apply equally). For a full analysis of how *Loving*'s reasoning applies to prohibitions on same-sex marriage, see KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 166, at 53-71 and Koppelman, *supra* note 152.

The analogy becomes even more compelling when considered against one popular nineteenth-century rationale for enslaving African-Americans. Asserting slaves' natural inferiority, slavery's supporters invoked the analogous situation of women, whom "God and nature intended . . . to be [men's] subordinates in marriage." NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 61 (2002).

175. 852 P.2d at 59-67.

176. *See Goodridge*, 798 N.E.2d at 951 n.8.

177. For a review of the pre-*Lawrence* and pre-*Goodridge* challenges and developments in this country and abroad, *see generally Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2004-27 (2003).

178. *See generally* 744 A.2d 864.

179. 798 N.E.2d at 958, 961 n.21, 968 (noting discrimination or prejudice based on sexual orientation). *Goodridge*'s sequel, the *Opinions of the Justices to the Senate*, goes further when it rejects civil unions as a remedy, emphasizing the inequality of a separate status for same-sex couples. *See* 802 N.E.2d 565, 569 (Mass. 2004).

critique of the stigma, discrimination, and demeaning effects of sodomy bans shows sensitivity to the experiences of gays and lesbians.<sup>181</sup> Although none of these cases determines that gays and lesbians constitute a suspect class<sup>182</sup> and *Baker* tolerates a separate status for same-sex couples in authorizing civil unions, one can nonetheless detect here an incipient gay-rights jurisprudence.<sup>183</sup> Likewise, opponents of the current spate of proposed constitutional amendments to limit marriage to one man and one woman emphasize the harms to gays and lesbians.<sup>184</sup> To the extent that choosing a male intimate partner or spouse is simply one more traditional assumption about "the way women are" and vice versa,<sup>185</sup> the emerging recognition of gay rights helps undo yet another gender stereotype.<sup>186</sup>

The most salient reasons emerging from judicial opinions rejecting calls for same-sex marriage invoke procreation as the central purpose of marriage<sup>187</sup> and a definition of marriage as a male-female relationship.<sup>188</sup> An additional argument has received increasing emphasis lately, the argument that children need both a mother and a father.<sup>189</sup> *Goodridge* succinctly replies to all of these.<sup>190</sup> More broadly, however, all

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180. 539 U.S. 558 (2003).

181. *Id.* at 575.

182. See *Goodridge*, 798 N.E.2d at 961; *Baker*, 744 A.2d at 878 & n.10 (invoking inclusive purpose of state constitution's Common Benefits Clause). The majority in *Lawrence* declined to rely on equal protection at all, 539 U.S. at 575, and remained vague about the standard of review applied. But see *id.* at 585 (O'Connor, J., concurring) (determining that the statute violates equal protection under any standard of review).

183. In addition, the concurring opinion in *Baehr* analyzes "sex" to include sexual orientation. 852 P.2d at 68-71 (Burns, J., concurring).

184. See generally Appleton, *supra* note 164.

185. *United States v. Virginia*, 518 U.S. 515, 541 (1996) (evaluating the relevance of "typically male or typically female 'tendencies'").

186. Valdes would reject the purported distinctions among these approaches because, in his view, sexual-orientation discrimination is always sex-based or gender-based discrimination. See Valdes, *supra* note 11, at 17, 204, 338; Koppelman, *Why Discrimination*, *supra* note 166, at 215. To the extent, then, that critics have said that to attack laws disadvantaging gays as sex discrimination misses the central moral wrong of such laws, these critics seem to have overlooked the gender stereotyping that privileging heterosexuality represents. See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 498, 503 (2001). But see Hart, *supra* note 115, at 114 (advocating debate "framed in terms of sexual orientation discrimination as a form of sex discrimination").

187. E.g., *Goodridge*, 798 N.E.2d at 995-96 (Cordy, J., dissenting); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); see also Frank Bruni, *Vatican Exhorts Legislators to Reject Same-Sex Unions*, N.Y. TIMES, Aug. 1, 2003, at A1 (reporting Vatican's statement that the inability of same-sex couples to procreate on their own violates "one of the God-given and most important aspects of marriage").

188. E.g., *Standhardt v. Superior Ct.*, 77 P.3d 451, 458 & n.10 (Ariz. Ct. App. 2003); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

189. See *Goodridge*, 798 N.E.2d at 1000 n.29 (Cordy, J., dissenting) ("This family structure raises the prospect of children lacking any parent of their own gender. For example, a boy raised by two lesbians as his parents has no male parent . . ."); see also Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 819, 822-23 (11th Cir. 2004) (upholding Florida law barring adoptions by gays and lesbians); Maggie Gallagher, *What Marriage Is For*, in SAME SEX MARRIAGE PRO & CON: A READER 263, 269 (Andrew Sullivan ed., 2004)



three justifications for excluding same-sex couples from marriage unravel when tested under gender-equality doctrine.

The first reason, procreation, arguably resides in the safe haven for different treatment that the Court has created for instances in which men and women are not similarly situated. Yet as everyone knows, the narrow tailoring that equal protection requires in gender cases cannot be satisfied, given frequent marriages among the elderly, the infertile, the imprisoned,<sup>191</sup> and the committed childless-by-choice,<sup>192</sup> as well as the proliferation of assisted reproductive technologies, which allow same-sex couples to procreate.<sup>193</sup> In addition, even traditional rules that are rooted in biological differences between men and women can have meaning for same-sex couples. Consider, for example, Vermont's extension of the traditional presumption of legitimacy for children born in marriage to children born in a civil union,<sup>194</sup> as well as case law in California insisting on a gender-neutral application of paternity laws to establish parentage in a mother's female partner.<sup>195</sup>

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(condemning "unisex marriage" which "would mean that the law was neutral as to whether children had mothers and fathers"). This argument was made repeatedly on the Senate floor by those supporting the proposed Federal Marriage Amendment. *See* 150 CONG. REC. S8087-88 (daily ed. July 14, 2004) (statement of Sen. McConnell); 150 CONG. REC. S7961 (daily ed. July 13, 2004) (statement of Sen. Hutchison); *id.* at S7966 (statement of Sen. Inhofe); *id.* at S7968 (statement of Sen. Ensign); *id.* at S7980, S8009-10, S8013-14 (statements of Sen. Santorum); *id.* at S7997, S8011 (statements of Sen. Brownback); 150 CONG. REC. S7906-09 (daily ed. July 12, 2004) (statement of Sen. Santorum); *id.* at S7920-22 (statement of Sen. Cornyn); *id.* at S7923-24 (statement of Sen. Lott).

190. The majority repudiates the contention that procreation is the essential purpose of marriage. 798 N.E.2d at 962 (rejecting this reason because "it singles out the one unbridgeable difference between same-sex and opposite-sex couples and transforms that difference into the essence of legal marriage"). The concurrence condemns the inadequacy of using the traditional definition to decide the case. *Id.* at 972-73 (Greaney, J., concurring) (condemning reliance on traditional definition as "conclusory" because it "bypasses the core question"). And, as far as children's needs are concerned, the majority demonstrates how excluding from marriage and its benefits families headed by same-sex couples unjustifiably punishes the children in these families. *Id.* at 961-64.

191. *See Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (recognizing constitutionally protected attributes of marriage that survive incarceration).

192. *See Koppelman, Why Discrimination*, *supra* note 166, at 275-76.

193. *See Goodridge*, 798 N.E.2d at 961-62 & nn.23-24. *See generally, e.g.,* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994); SILVER, *supra* note 45, at 206-22; Marla J. Hollandsworth, *Gay Men Creating Families through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

194. VT. STAT. ANN. tit. 15, § 1204(f) (2002). *But see Opinions of the Justices*, 802 N.E.2d 565, 577 n.3 (opinion of Justice Sosman).

195. *Kristine H. v. Lisa R.*, 2004 Cal. App. LEXIS 1045 (July 29, 2004), *review granted, opinion depublished* by *Kristine Renee H. v. Lisa Anne R.*, 97 P.3d 72 (Cal. 2004). The headline in a legal newspaper reporting the case proclaimed: "Calif. Court Breaks Precedent, Says Woman Can Be Dad." Mike McKee, *Calif. Court Breaks Precedent, Says Woman Can Be Dad*, THE RECORDER, July 1, 2004, at 1, available at LEXIS, Legal News

The second reason, relying on the supposed definition of marriage, loses its force now that modern equality principles have gender-neutralized the law's old stereotypical expectations of husbands and wives in one aspect of family life after another.<sup>196</sup> Put differently, the Court and other lawmakers have dismantled the old gendered family rules one at a time. How can the whole be different from the sum of the parts?<sup>197</sup>

Hence, the male-female requirement not only seems at odds with the anti-stereotyping analysis;<sup>198</sup> the requirement also becomes paradoxical because this very same anti-stereotyping analysis deprives "wife" and "husband" of their traditional gender-specific definitions. What does it mean to be a wife, as distinguished from a husband, in today's era of gender-neutral family laws? A husband, as distinguished from a wife? What substantive content does the law give to each such status or role, now that the Court and other lawmakers have developed gender-neutral rules for alimony, childcare, work outside the home, family leaves, and the like? Assuming that marriage is here to stay (despite abolitionists' cogent critiques<sup>199</sup>), then allowing only

Publications. See also Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261 (2003).

196. As noted earlier, such changes go beyond those compelled by state or federal constitutional equality guarantees to include legal rules (like the FMLA) that might have included sex-specific provisions but do not. See *supra* notes 159–62. This is not to deny that gender patterns in the family persist. See, e.g., Donald J. McNeil Jr., *Real Men Don't Clean Bathrooms*, N.Y. TIMES, Sept. 19, 2004, §4, at 3 (commenting on disproportionate amount of family care work that women perform).

197. See *Goodridge*, 798 N.E.2d at 965 n.28 (rejecting understanding of marriage based on "separate spheres"). From this perspective, then, one could say that same-sex marriage is "no big deal" because the invalidity of laws prescribing gender roles for spouses amounts to the same thing. See, e.g., Adam Haslett, *Love Supreme: Gay Nuptials and the Making of Modern Marriage*, THE NEW YORKER, May 31, 2004, at 76; cf. Eskridge, *supra* note 116, at 356 ("Recognizing same-sex marriage would contribute to the erosion of gender-based hierarchy within the family, because in a same-sex marriage there can be no division of labor according to gender."); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9 (1991); Jennifer Wiggins, *Marriage Law and Family Law: Autonomy, Interdependence and Couples of the Same Gender*, 41 B.C. L. REV. 265, 312–14 (2000) (discussing how same-sex marriage will make marriage "less sexist"); cf. also Ginia Bellafante, *Two Fathers, With One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A1.

198. See *Law*, *supra* note 165, at 230–33.

199. For the negative consequences that follow from the state's privileging of marriage, see, for example, MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167 (2000); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993). For a more upbeat look at the assumptions that marriage is here to stay and, overall, proves beneficial, see, for example, Bernstein, *supra* note 167; Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996). For the early debate in the gay rights community about whether to pursue marriage access, compare Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIANS, GAY MEN, AND THE LAW* 398 (William B. Rubenstein ed., 1993), with Paula Ettlebrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIANS, GAY MEN, AND THE LAW* 401 (William B. Rubenstein ed., 1993). See also, Peggy Pascoe, *Sex, Gender, and Same-*

women to become wives and only men to become husbands must raise significant equal protection questions.<sup>200</sup>

Finally, these equal protection questions persist even if the focus shifts from gender roles to gender-role models, the apparent agenda of those who oppose same-sex marriage on the theory that children need a male and a female parent. The Court's rejection of stereotypes challenges assumptions about the performance of gender itself. Official expectations that males and females exhibit particular "tendencies,"<sup>201</sup> or present themselves in a particularly masculine or feminine way<sup>202</sup> contravene the Court's vision of gender equality. Hence, the law cannot presuppose that children need male and female models in order to grow up to be appropriately behaving males and females themselves. Ironically, those who make this argument that every child needs a mother and a father have allied themselves with feminists and others who emphasize the social construction of gender (and hence see gender as nurture-based);<sup>203</sup> after all, if gender performance were "hard-wired" (or nature-based), then children would not need such role models!

Once these asserted justifications crumble, then what can explain the persistence of the male-female requirement even in the face of social change and legal challenge? Two primary possibilities seem plausible yet ultimately remain unsatisfying: homophobia and anatomy.<sup>204</sup>

To the extent that homophobia provides a reason for the male-female marriage requirement, it indicates that some boundaries on the sexuality continuum still prevail. Obviously, to cite fear and abhorrence of same-sex intimacy or of those who engage in it to justify the requirement makes further analysis all but impossible. (That is not to question the reality that homophobia exists; rather it means that homophobia is a "conversation stopper." It does not allow for additional debate.) Nonetheless, one might counter with the Supreme Court's language in *Romer v. Evans*,<sup>205</sup> finding fatal equal protection problems in classifications that impose disadvantages "born of animosity."<sup>206</sup> The Court's more sweeping opinion in *Lawrence v. Texas*,<sup>207</sup> calling for

*Sex Marriage, in IS ACADEMIC FEMINISM DEAD? THEORY IN PRACTICE* 86 (The Social Justice Group at the Center for Advanced Feminist Studies, University of Minnesota eds., 2002)

200. To borrow an argument from Mary Anne Case, we could say that a wife's "job" (being a "wife") will not be valued until it is open to men. See Case, *supra* note 103, at 3.

201. *United States v. Virginia*, 518 U.S. 515, 541 (1996); see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (rejecting stereotype that only women should be nurses).

202. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); cf. generally Case, *supra* note 103.

203. See *supra* notes 25–26 and accompanying text.

204. One might imagine still other possible explanations. Perhaps the rule is designed to ensure that women remain available to men. See, e.g., Koppelman, *Why Discrimination*, *supra* note 166, at 247; cf. BERTRAND RUSSELL, *MARRIAGE AND MORALS* 17 (1929) ("the whole conception of female virtue has been built up in order to make the patriarchal family possible"). Alternatively, the rule might have evolved so that women would tame male promiscuity. See, e.g., BAILEY, *supra* note 9, at 89–90. But then William Eskridge asks why gays shouldn't have similar opportunities for being tamed. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8–13 (1996).

205. 517 U.S. 620 (1996).

206. *Id.* at 634.

207. 539 U.S. 558 (2003).

respect for the private lives of gays and condemning sexual conduct crimes that "demean [gays'] existence,"<sup>208</sup> sends a strong message against laws based on bare homophobia. True, the *Lawrence* majority and concurring opinions steer clear of same-sex marriage, in their emphases on privacy;<sup>209</sup> still, Justice Scalia and other critics note the difficulty of maintaining such boundaries, especially when relying on equal protection grounds, as Justice O'Connor's concurrence does.<sup>210</sup> *Goodridge*, decided soon after *Lawrence*, amply fulfills this prophecy.<sup>211</sup> Finally, the "model families" represented by the well-chosen plaintiffs in *Goodridge* and similar challenges should not be overlooked in the efforts to dislodge homophobia.<sup>212</sup>

According to some scholars, homophobia is not an end in itself but a means of preserving patriarchy and traditional gender roles.<sup>213</sup> Yet, certainly the Supreme Court's anti-stereotyping analysis and equality jurisprudence would doom this rationale, if it were used to justify the male-female requirement for marriage.<sup>214</sup> Justice Scalia's dissent in *Lawrence v. Texas* misses this point in rejecting the analogy

208. *Id.* at 578.

209. See *id.*; *id.* at 585 (O'Connor, J., concurring). Although marriage entails an intimate, private choice, it also entails state recognition. See Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992); see also *Goodridge*, 798 N.E.2d at 954 & 957 n.14. But cf. Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987) (examining de facto approach to marriage).

210. See *Lawrence*, 539 U.S. at 599–601 (Scalia, J., dissenting).

211. 798 N.E.2d at 948, 953, 958 n.17, 959 (all citing *Lawrence v. Texas*, 539 U.S. 558 (2003)); *id.* at 962 (citing *Romer*, 517 U.S. at 633); see also *Opinions of the Justices*, 802 N.E.2d 565. Massachusetts has an Equal Rights Amendment, but the *Goodridge* majority (unlike the concurrence) does not explicitly treat the issue as one of sex-based discrimination. See *supra* notes 168, 176.

212. For example, consider recent litigation in Washington state. According to news reports, a trial judge praised the plaintiffs in striking down that state's male-female marriage requirement:

In a ruling that gay couples can marry under Washington state law, King County Superior Court Judge William Downing described the sixteen plaintiffs as the kind of people "any of us should be proud to call a friend or neighbor or to sit with at small desks on back-to-school night."

Downing wrote: "(Their) lives reflect hard work, professional achievement, religious faith and the willingness to stand up for their beliefs. They are law-abiding, taxpaying model citizens. They include exemplary parents, adoptive parents, foster parents and grandparents.

"They know what it means to make a commitment and to honor it."

*Ruling Lauds "Model Citizens," Gay Marriage Ruling, 8 Couples Who Sued, Judge Says Plaintiffs Know What Making a Commitment Means*, SEATTLE TIMES, Aug. 5, 2004, at A14, available at LEXIS, News Library, SEATTM File (alteration in original); see also Toni Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 102–08 (1996) (urging "calls to empathy" based on narratives about gays' lives).

213. E.g., Law, *supra* note 165, at 219–21.

214. See Koppelman, *Why Discrimination*, *supra* note 166, at 254 ("Homosexuality is a threat to the family only if the survival of the family requires that men and women follow traditional sex roles.").

between antiscegenation laws and same-sex sodomy bans.<sup>215</sup> Although he discerns (and criticizes) the white supremacy animating the former, he fails to recognize the gender hierarchy underlying the latter.<sup>216</sup>

Alternatively, some would reject the term "homophobia," as I have used it in the preceding paragraphs, in favor of "morality." They would say that accepted, traditional moral teachings, reinforced by religious doctrine, explain the male-female requirement for marriage.<sup>217</sup> Yet any asserted difference between homophobia and moral disapproval is becoming so elusive that one might read Justice O'Connor to regard these two as indistinguishable.<sup>218</sup> Although morality played a decisive role in *Bowers v. Hardwick*<sup>219</sup> and Justice Kennedy in dissent invoked morality to defend the constitutionality of the ban on particular abortion procedures invalidated in *Stenberg v. Carhart*,<sup>220</sup> his majority opinion in *Lawrence v. Texas* unmistakably signals the limits of morality-based justifications. In protecting consensual same-sex intimacy in private from state intrusion, Kennedy's opinion for the *Lawrence* majority concludes that the sodomy ban "further[s] no legitimate state interest."<sup>221</sup> Although the opinion studiously avoids identifying the applicable standard of review,<sup>222</sup> the Court's precedents use strict<sup>223</sup> or heightened<sup>224</sup> scrutiny to review marriage restrictions.<sup>225</sup> Whatever the

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215. 539 U.S. at 600 (Scalia, J., dissenting); see KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 166, at 62–63, 70.

216. See KOPPELMAN, THE GAY RIGHTS QUESTION, *supra* note 166; Law, *supra* note 165; see also Goodridge, 798 N.E.2d at 971 (Greaney, J., concurring) (describing discrimination here as similar to, but more subtle than, that in antiscegenation cases).

217. See, e.g., Bruni, *supra* note 187 (noting that the Vatican calls laws recognizing same-sex couples "gravely immoral"); Neil A. Lewis, *Bush Backs Bid to Block Gays from Marrying: Favors Legal Definition Specifying Both Sexes*, N.Y. TIMES, July 31, 2003, at A1; Letter to Bishops, *supra* note 97. Eskridge has written that, at this particular time in history, we cannot help "moralizing about homosexuality"—whether in favor of the traditional disapproval of gays and lesbians or in opposition to that tradition. See Eskridge, *supra* note 116, at 368–75.

218. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) ("A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review."). See generally Barbara J. Flagg, "Animus" and Moral Disapproval: A Comment on *Romer v. Evans*, 82 MINN. L. REV. 833 (1998).

219. 418 U.S. 186 (1986). In *Bowers*, the majority applied the rational basis test to reject a privacy challenge to Georgia's enforcement of its sodomy prohibition against a male couple, on the ground that morality provided a legitimate justification for the ban. *Id.* at 195–96.

220. 530 U.S. 914, 962–64 (2000) (Kennedy, J., dissenting).

221. 539 U.S. at 558 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

222. *Cf. id.* at 580 (O'Connor, J., concurring) (applying the "searching form" of rational basis review under Equal Protection Clause); *id.* at 599 (Scalia, J., dissenting) (critiquing the result of rational basis review detected in the majority opinion).

223. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating antiscegenation restrictions on marriage, which is a fundamental right).

224. See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (noting that significant interference with the right to marry requires sufficiently important state interests and narrow tailoring).

standard used in *Lawrence*, one could argue that the standard applied to the male-female marriage requirement should be at least as demanding, if not more demanding.<sup>226</sup>

The second arguably irreducible reason for the "opposite-sex" marriage requirement relies on male and female genital anatomy per se (without reference to reproductive capacities<sup>227</sup>). In other words, a penis is a bona fide occupational qualification ("BFOQ") for husbands, and a vagina is for wives.<sup>228</sup> This premise appears to underlie the religious argument that marriage requires "gender complementarity."<sup>229</sup> Certainly, this argument would avoid the problem of relying on unconstitutional gender-based role assignments, given that, anatomically, males and females are not similarly situated. Yet, discerning whether this is a free-standing argument or a disguised version of the response based on homophobia, with or without the morality gloss, remains elusive. Precisely *why* must marriage require one anatomical male and one anatomical female? Anatomy provides a peculiar criterion for a public event such as marriage<sup>230</sup> because anatomy is ordinarily not a sexual cue visible for public inspection; rather, we infer

225. Admittedly, such reasoning begs the question whether, by definition, marriage refers only to the union of male-female couples. See *supra* notes 196–97 and accompanying text.

226. A court might invoke the claim for state recognition that marriage entails to apply a lower standard of review to the male-female marriage requirement than to same-sex sodomy crimes. *Lawrence* could be read to suggest this approach, given the way the majority distinguishes private sexual conduct from cases involving "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. Such reasoning might follow that used to support a lower standard of review for denials of abortion funding (rational basis) than for criminal restrictions on abortion (strict scrutiny). Compare *Harris v. McRae*, 448 U.S. 297 (1980), with *Roe v. Wade*, 410 U.S. 113 (1973). Further, challengers in the abortion-funding cases claimed discrimination because the state provided subsidies for indigent women seeking to carry their pregnancies to term, just as challengers of the male-female requirement for marriage would certainly claim discrimination. Then, of course, there is the possibility that the Court might split the difference or develop a new standard of review, such as the undue burden standard, as three Justices did in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (joint opinion). Later, a majority adopted the undue burden standard to review abortion restrictions. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

227. See *supra* notes 191–95 and accompanying text.

228. A BFOQ is a defense to sex-discrimination claims under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-2(e) (2000) (exempting from the prohibition on employment discrimination situations in which sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise"). See Case, *supra* note 159, at 1489 (considering whether capacity for vaginal intercourse constitutes prerequisite to marriage); Valdes, *supra* note 11, at 328 (discussing "'authentic' sex discrimination," based on "a person's external genitalia, or, at most, some other biophysical aspect of the body that may be deemed closely or substantially related to sex").

229. See, e.g., JOHN PIPER, *A Vision of Biblical Complementarity*, in RECOVERING BIBLICAL MANHOOD AND WOMANHOOD: A RESPONSE TO EVANGELICAL FEMINISM (Wayne Gruden & John Piper, eds.), available at <http://leaderu.com/orgs/cbmw/rbmw>. The complementarity argument is rooted in, but not limited to, anatomy. John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066–67 (1994); see also Cruz, *supra* note 159, at 1079.

230. See generally COTT, *supra* note 174.

whether an individual is male or female based on secondary sex characteristics (including body type and the presence or absence of facial hair), behavior, name, adherence to customary norms of appearance (including hairstyle and clothing), and other performative acts.<sup>231</sup> Moreover, as those who have plastic surgery and sex-reassignment procedures illustrate, anatomy is not a constant.<sup>232</sup>

Yet penises and vaginas do make heterosexual penetration possible, which critics claim has become the hierarchy-enforcing essence of the current understanding of marriage.<sup>233</sup> Further, the minority approach to transsexuals' ability to enter into a valid marriage seems to support a justification based on male and female anatomy. A New Jersey case, which exemplifies this approach, *M.T. v. J.T.*,<sup>234</sup> upheld a marriage between a male and a post-surgical male-to-female transsexual, based on the latter's anatomical capacity to function sexually as a female. The court noted that medical treatment had harmonized the transsexual's genitalia with her gender, so that she had "become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy."<sup>235</sup> This reasoning also comports with traditional legal rules allowing annulment when one party is physically unable to consummate a marriage.<sup>236</sup> In addition, the treatment of males with "inadequate" penises and the assignment of a female gender to them suggest the importance of certain anatomical attributes.<sup>237</sup>

On the other hand, a majority of courts faced with issues like that posed in *M.T.* has held that anatomy—at least when medically constructed—remains insufficient to change an individual's legal sex for purposes of the male-female requirement for marriage.<sup>238</sup> Under these cases, although a transsexual with a surgically constructed

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231. See PREVES, *supra* note 4, at 17; see also FAUSTO-STERLING, *supra* note 11, at 243–44. Children typically reach conclusions about sex classifications without realizing that anatomy plays any role. FAUSTO-STERLING, *supra* note 11, at 247–48; see also Franke, *supra* note 103, at 39 (discussing "cultural genitals" and gender stereotypes).

232. FAUSTO-STERLING, *supra* note 11, at 242–43.

233. See generally Sally F. Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285 (1998); see also Koppelman, *supra* note 152, at 235 ("The central outrage of male sodomy is that a man is reduced to the status of a woman, which is understood to be degrading."). Moreover, the leading case for spelling out the equal protection rules that apply when there are "real differences" between males and females concerned heterosexual penetration. *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981) (upholding a California law that makes only males capable of statutory rape).

234. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

235. *Id.* at 211 (emphasis added).

236. *E.g.*, *D. v. D.*, 20 A.2d 139 (Del. 1941); *Tompkins v. Tompkins*, 111 A. 599 (N.J. Ch. 1920).

237. See *supra* notes 137–38 and accompanying text.

238. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (see *infra* notes 252–59 and accompanying text); *In re Application for a Marriage License for Jacob B. Nash and Erin A. Barr*, Nos. 2002-T-0149 and 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. 2003); *Littleton v. Prange*, 9 S.W.3d 223, 230–31 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000); see also *Bellinger v. Bellinger*, 2 A.C. 467 (H.L. 2003) (recognizing conflict with European Convention on Human Rights). Commentators have referred to outcomes like those in the cited cases as the majority view. *E.g.*, Berrigan, *supra* note 109, at 88; Anthony S.

vagina may have female anatomy, the law will not recognize her as female for purposes of marriage. Courts have not yet addressed what this rule means for intersexed individuals, given their often surgically fashioned genitalia. Further, Suzanne Kessler has observed that in some situations sexual activity helps make anatomy possible, rather than vice versa.<sup>239</sup>

In any event, both of these tacks, homophobia and anatomy, have vulnerabilities. To the extent that homophobia is at work, recent developments prevent the conclusion that change cannot occur—or that it always requires slow, incremental steps. Notwithstanding the calls for a federal constitutional amendment<sup>240</sup> and similar efforts at the state level,<sup>241</sup> consider the breathtaking speed with which we have witnessed Vermont's civil unions;<sup>242</sup> Ontario, Canada's same-sex marriages;<sup>243</sup> the remarkable rulings in *Lawrence* and *Goodridge*; San Francisco's sudden flurry of marriage licenses (whatever their validity) issued over Valentine's Day weekend of 2004;<sup>244</sup> and the celebration of unquestionably valid same-sex marriages in Massachusetts,

Winer, *Assimilation, Resistance, and Recent Transsexual Marriage Cases*, 1 SEATTLE J. FOR SOC. JUST. 653, 661–64 (2003).

239. She writes how transsexuals who have surgically constructed vaginas receive instructions to engage in sexual intercourse to maintain the opening. KESSLER, *supra* note 24, at 108. Intersexed individuals who have vaginoplasty also must follow regular dilation exercises. See PREVES, *supra* note 4, at 78–79.

240. See President George W. Bush, Remarks of the President, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), transcript available at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>. The Senate considered a proposed constitutional amendment, S.J. Res. 40, 108th Cong. (2004). After three days of debate, the Senate voted fifty to forty-eight against moving forward with the proposal. See Carle Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1; *Senate Roll-Call Vote*, N.Y. TIMES, July 15, 2004, at A19.

241. A 2004 compilation listed Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, and Utah as states with constitutional same-sex marriage bans on the ballot for that year and Arkansas, Massachusetts, Michigan, Montana, North Dakota, Ohio, and Oregon as states with petitions filed to put such measures on the ballot. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058> (last updated Aug. 26, 2004). In all, lawmakers in twenty-five states have introduced proposed constitutional amendments, and “[a]ll would require a statewide vote.” *Id.* On August 3, 2004, 71% of those casting ballots voted in favor of adding the following language to the Missouri Constitution: “That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.” See Matthew Franck, *Foes of Gay Marriage Hope Vote Is Catalyst*, ST. LOUIS POST-DISPATCH, Aug. 5, 2004, at A1. On November 2, 2004, constitutional amendments barring same-sex marriage passed in all eleven states where they appeared on the ballot. See, e.g., James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES, Nov. 4, 2004, at P4.

242. VT. STAT ANN. tit. 15, §§ 1201–06 (2003).

243. Halpern v. Canada, [2003] O.R.3d 161, 2003 Ont. Rep. LEXIS 153; see also Reference re Same-Sex Marriage, 2004 SCC 79 (Can.) (upholding constitutionality of proposed law authorizing same-sex marriage throughout Canada).

244. See Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24. The California Supreme Court subsequently invalidated the same-sex marriages celebrated in San Francisco. Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004).



beginning on May 17, 2004.<sup>245</sup> And all of these North American developments follow earlier recognition of same-sex marriage in Belgium and the Netherlands.<sup>246</sup>

Finally, both homophobia- and anatomy-based explanations for the "opposite-sex" requirement presume clear delineation between males and females, which the medical practices reviewed above call into question. Indeed, the analysis becomes maddeningly circular when one recalls that, historically, homophobia provided a principal justification for the need to determine conclusively the sex of every person<sup>247</sup> and that a child's anatomy (sometimes medically "corrected") typically dictates initial sex assignment.<sup>248</sup> Today, these difficulties have entered the legal consciousness through several recent cases about transsexuals and marriage, explored below.

## 2. Transsexual Marriage as a "Wedge" Issue

A number of commentators recently have suggested that the male-female requirement for marriage necessarily begins to disintegrate when applied to transsexuals. The argument proceeds as follows, using as an example a post-surgical male-to-female transsexual. The Constitution guarantees the fundamental right to marry.<sup>249</sup> Many states will grant this transsexual an amended birth certificate, replacing the original male designation with a female designation. With the amended certificate, this individual cannot marry a female in any state but Massachusetts because of prohibitions against same-sex marriage.<sup>250</sup> Yet, the majority view expressed in American case law also holds invalid marriages between such an individual and a male, on the theory that sex is permanently determined at birth and cannot be altered by medical intervention. Something has got to give to avoid depriving transsexuals of the

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245. See Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004 at A16 (describing celebrations as first same-sex marriage licenses were issued in Massachusetts).

246. See *Developments in the Law*, *supra* note 177, at 2006–09.

247. See *supra* notes 117–18 and accompanying text.

248. In other words, does homophobia dictate sexual classification, or does sexual classification "precede" homophobia? Does anatomy dictate sexual classification, or does sexual classification dictate anatomy? Cf. KESSLER, *supra* note 24, at 53 (summarizing various purposes of genitals, which parents and physicians use at child's birth to assign gender, which adults often use for sexual pleasure and occasionally for reproduction, and which everyone uses to urinate).

249. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384–86 (1978). But it does not follow that the Constitution would prevent the abolition of civil marriage. See Cain, *supra* note 199, at 31–43 (concluding that state could abolish marriage so long as intimacy remained protected).

250. Even in Massachusetts only domiciliaries are eligible for same-sex marriage, a limitation acknowledged in *Goodridge*, 798 N.E.2d at 967, but facing challenges. See Pam Belluck, *Eight Diverse Couples Join to Fight Massachusetts*, N.Y. TIMES, June 18, 2004, at A22. By contrast, a number of U.S. citizens have traveled to Ontario to marry. See Clifford Krauss, *A Wedding in Canada: Gay Couples Follow a Trail North Blazed by Slaves and War Resisters*, N.Y. TIMES, Nov. 23, 2003, § 4, at 7.

right to marry altogether.<sup>251</sup> With this fracture in the male-female requirement, so the argument goes, the ban on same-sex marriage ultimately will collapse.

Two recent cases highlight the transsexual's "Catch-22," while also summarizing the current state of the law. The Supreme Court of Kansas's decision in *In re Estate of Gardiner*<sup>252</sup> provides a useful illustration of the majority view on marriage for transsexuals.<sup>253</sup> The court ruled invalid the marriage between the late Marshall Gardiner, a male, and J'Noel Ball Gardiner, a post-surgical male-to-female transsexual, in a challenge brought by Marshall's son to J'Noel's right to inherit a widow's share.<sup>254</sup> The court decided that the case turned on questions of law: the meanings of "sex," "male," and "female" in the marriage statute. The court inferred from the statute's silence the legislative intent to use only the ordinary meanings of these terms, which do not include transsexuals.<sup>255</sup> J'Noel remained a legal male<sup>256</sup>—a conclusion that required the court to reject an amended Wisconsin birth certificate identifying J'Noel as female, a Wisconsin driver's license with the same information, and a much more nuanced consideration of sex and gender developed in the appellate court's opinion. The appellate court, relying on recent medical and legal literature covering the many different bases on which a determination of sex and gender might rest, had seen the

251. See, e.g., Berrigan, *supra* note 109, at 115; Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 263–65 (1998); Flynn, *supra* note 103, at 418; Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court Opens PanDOMA's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEXUALITY 1, 4–5, 124–26 (1999–2000); Mark Strasser, *Harvesting the Fruits of Gardiner: On Marriage, Public Policy, and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 198–99 (2003). But see Phyllis R. Frye & Alyson D. Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 Alb. L. Rev. 1031, 1035 (2001) (asserting that advocates of same-sex marriage reject transgender marriages as "wedge issue").

252. 42 P.3d 120 (Kan. 2002).

253. See *supra* note 238 and accompanying text.

254. The court accepted evidence that Marshall knew of J'Noel's medical history before the would-be marriage. *Gardiner*, 42 P.3d at 122. Although some marriages like that of Marshall and J'Noel might remain valid because they go unchallenged, the approach of the Supreme Court of Kansas reflects the majority view among litigated and reported cases. Moreover, the outcome in *Gardiner* makes the marriage void, not just voidable. Cf. BOYLAN, *supra* note 82, at 240 (claiming, as new male-to-female transsexual, author can remain married to her wife, but all subsequent marriages must be with a man); Strasser, *supra* note 251, at 209–11 (suggesting such marriages should be voidable, not void); Frye & Meiselman, *supra* note 251, at 1036–41 (noting existing same-sex marriages involving transgendered spouses).

255. *Gardiner*, 42 P.3d at 138 ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."); see also *id.* at 136 (interpreting "'opposite sex' in the narrow traditional sense").

256. Accord, *In re Application for a Marriage License for Jacob B. Nash and Erin A. Barr*, Nos. 2002-T-0149 & 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. 2003); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999), cert. denied, 531 U.S. 872 (2000). But see Thomas W. Mayo, *Sex, Marriage, Medicine, and Law: "What Hope of Harmony?"*, 42 WASHBURN L.J. 269, 277 (2003) (suggesting that legislature might have assumed that post-surgical transsexuals are covered by sex of reassignment); Strasser, *supra* note 251, at 198 (suggesting a transsexual might not fit either "male" or "female" under *Gardiner* and thus might not be able to marry at all). Cf. Kitchin, *supra*, note 82 (condemning classification as arbitrary, hence unconstitutional).

question of J'Noel's sex as one of fact.<sup>257</sup> According to the appellate court, as many as eight different factors might prove relevant for a determination of sex or gender,<sup>258</sup> which need not remain fixed from the time of birth. Thus, the appellate court would have remanded the case for further factual development about J'Noel's particular circumstances.<sup>259</sup>

In another recent case, *In re Heilig*,<sup>260</sup> the petitioner sought legal recognition of her sex change, from male to female. The highest court in Maryland decided that:

... (1) gender itself is a fact that may be established by medical and other evidence, (2) it may be, or possibly may become, other than what is recorded on the person's birth certificate, and (3) a person has a deep personal, social, and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become.<sup>261</sup>

The court accepted the arguments that no single test for gender controls<sup>262</sup> and that a permanent and irreversible change from the sex originally assigned warrants legal recognition. The opinion presents a thorough examination of the medical literature about transsexuality, sexual ambiguity, and gender identity.<sup>263</sup> Despite this open and inclusive approach, however, the court expressly acknowledged the limited stakes: Heilig's petition raised no question about marriage, and the court made clear it would express no opinion on such issues.<sup>264</sup> Indeed, while the majority of marriage cases refuse to recognize sex changes, several states have statutes that authorize amendments of birth certificates or drivers' licenses after a medically documented sex change.<sup>265</sup>

Together, cases like *Gardiner* and *Heilig* make the "wedge issue" argument particularly forceful. After all, what is someone like J'Noel supposed to do about marriage? Marry a male, only to have a court declare the marriage invalid as the Supreme Court of Kansas did? Marry a female, only to violate the "opposite-sex" requirement for any authorities that consider controlling the amended driver's license or birth certificate? In fact, after a Texas court reached a result like that of the Kansas Supreme Court,<sup>266</sup> a number of same-sex couples successfully sought marriage

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257. 22 P.3d 1086, 1110 (Kan. Ct. App. 2001).

258. *See id.* at 1094.

259. *See id.* at 1106–07, 1110. For critiques of the Kansas Court of Appeals's approach, see Strasser, *supra* note 251, at 199–200; Winer, *supra* note 238, at 665–66.

260. 816 A.2d 68 (Md. 2003).

261. *Id.* at 79.

262. *See id.* at 73.

263. *See In re Heilig*, 816 A.2d 68, 71–79 (Md. Ct. Spec. App. 2002).

264. *Id.* at 85–86 n.9.

265. *See* Greenberg, *supra* note 109, 309–17 (discussing variations among jurisdictions on changes of official documents); *see also In re Guido*, 771 N.Y.S.2d 789 (N.Y. Civ. Ct. 2003) (granting name change). This approach invites strategic decisions about whether a transsexual should seek an amended birth certificate, depending upon the sex classification of a prospective marriage partner. *See* Strasser, *supra* note 251, at 220–21.

266. *Littleton v. Prange*, 9 S.W.3d 223, 230–31 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

licenses, based on the fact that one prospective spouse had, before surgery, a different sex assignment.<sup>267</sup>

When the smoke clears, however, *Gardiner* demonstrates that the “wedge issue” strategy does not succeed, and *Heilig* stops short of applying its more flexible view of sex to marriage. Further, the opinion of the Supreme Judicial Court of Massachusetts in *Goodridge*<sup>268</sup>—together with the reality of same-sex marriage in the Netherlands, Belgium, Ontario,<sup>269</sup> San Francisco, and now Massachusetts<sup>270</sup>—all indicate that, as a legal strategy, this “wedge issue” is unnecessary. On the other hand, despite these transformative developments, we have begun to see a steady parade of efforts to stop same-sex marriage, including constitutional amendments and public referenda, which seem to be attracting increasingly vocal and numerous proponents and naysayers.<sup>271</sup> Perhaps the most accurate conclusions, then, to draw from these mixed signals would say that gender, gender identity, sex, sexuality, transsexuality, and marriage are all receiving new scrutiny,<sup>272</sup> with the pace of change acquiring remarkable speed and momentum, and that this transition—fitful as it may be—will surely continue.

#### D. Revisiting Middlesex: Enter the Intersexed Protagonist

Although the “wedge issue” argument has not succeeded as a *legal* strategy, its premise deserves additional exploration. At bottom, this argument invokes transsexuals like J’Noel to challenge an absolute male-female dichotomy and a marriage regime built on these classifications. In other words, the traditional rules of marriage rely on sex and gender categories that transsexuals like J’Noel arguably unsettle and defy—creating a wedge in our assumptions and confounding how we think about such matters. Now that members of the general public are participating in the debate about same-sex marriage through ballot initiatives and referenda,<sup>273</sup> situations like J’Noel’s acquire new significance because of their impact on popular understanding. In particular, such situations help reveal that the fundamental question in the marriage debate concerns the inevitability of gender categories.<sup>274</sup>

Yet on closer inspection, the promise of this particular approach, focusing on transsexuals, is oversold—even as a way of challenging popular conceptions of sex,

267. See, e.g., Frye & Meiselman, *supra* note 251; PREVES, *supra* note 4, at 38; *Lesbian Couple Get Marriage License*, SAN ANTONIO EXPRESS-NEWS, June 12, 2001, at 2B.

268. 798 N.E.2d 941 (Mass. 2003).

269. Halpern v. Canada, [2003] O.R.3d 161, 2003 Ont. Rep. LEXIS 153; see also, e.g., Clifford Krauss, *Canadian Leaders Agree to Propose Gay Marriage Law*, N.Y. TIMES, June 18, 2003, at A1. The constitutionality of the proposed law was upheld in *Reference re Same-Sex Marriage*, 2004 SCC 79 (Can.).

270. See *supra* note 245 and accompanying text.

271. See *supra* notes 240–41 and accompanying text; see generally Appleton, *supra* note 164.

272. See, e.g., *Developments in the Law*, *supra* note 177.

273. See *supra* notes 240–41 and accompanying text.

274. The Catholic Church seems to have recognized this point. See Letter to Bishops, *supra* note 97. See also BUTLER, *supra* note 32, at 217 (transgender enters into the political field “by not only making us question what is real, and what has to be, but by showing us how contemporary notions of reality can be questioned, and new modes of reality instituted”).

gender, and marriage. After all, J'Noel and the court that decided her case *accept* the validity of the male-female dichotomy, of gender classifications, and of the current marriage regime; they simply disagree about the category in which J'Noel belongs. The gender dysphoria that started J'Noel on her "journey"<sup>275</sup> caused her to identify herself as a female in a male's body,<sup>276</sup> communicating her acceptance of a binary view of sex and implicitly a male-female requirement for marriage.<sup>277</sup> Despite medical literature and legal authority that recognize sex reassignment surgery as medically necessary treatment<sup>278</sup> even though the patient's body appears healthy and "normal," skeptics like the majority-view courts continue to resist the conclusion that sex-reassignment surgery results in a "real" change of sex for purposes of marriage.<sup>279</sup> In short, using the lens of transsexuality to expose the limits of both traditional gender categories and existing marriage rules will neither clarify everyone's vision nor present the most effective challenge to what Taylor Flynn calls the "sex system."<sup>280</sup>

Although J'Noel's predicament is real, Cal's fictional story is far more compelling. Perhaps it provides a way to open, if not change, hearts and minds. We know the power of narrative to sharpen and deepen our understanding of the law.<sup>281</sup> Fictional narratives, like Cal's in *Middlesex*, can perform this role and arguably can do it better than nonfictional accounts,<sup>282</sup> particularly when the extended relationship that the

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275. *Gardiner*, 42 P.3d at 122.

276. *Id.*; see also, e.g., DEIRDRE N. MCCLOSKEY, *CROSSING: A MEMOIR* (1999); cf. *supra* note 113 (summarizing Bailey's controversial distinction between homosexual and autogynephilic male-to-female transsexuals).

277. See FAUSTO-STERLING, *supra* note 11, at 107 ("Winning the right to surgical and legal sex changes, however, exacted a price: the reinforcement of a two-gender system."); PREVES, *supra* note 4, at 46 ("[T]he example of traditional transsexualism . . . is actually a reinforcement of gender binarism."). On the other hand, consider the continuing relationships of some male-to-female transsexuals and their wives. See e.g., BOYLAN, *supra* note 82.

278. See Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 281-84 (1997).

279. Still other skeptics cling to the conclusion that such surgery entails the removal or modification of "healthy, undamaged organs and tissue." See *id.* at 284 (quoting *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980)). Of course, this conclusion is true, although there's considerably more to the story than that. For a provocative comparison, see Carl Elliot, *A New Way to be Mad: Amputations Sought by Healthy People*, ATL. MONTHLY, Dec. 1, 2000, at 73 (examining people who have had voluntary leg amputations as a result of "apotemnophilia"—the desire to be an amputee—and citing Dr. John Money as an authority on the subject).

280. Flynn, *supra* note 103, at 394.

281. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

282. Creating fictional narrative to illuminate the law is not new. See, e.g., Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (chronicling the story of Geneva Crenshaw). In the case of Cal's story, however, it probably was not created for the purpose of advancing legal analysis, although it serves the objective nicely.

reader develops with the protagonist (529 pages worth, here) not only suspends disbelief but also evokes affection, concern, and empathy.<sup>283</sup>

In addition, with fictional narrative, a skilled author can create precisely the right set of facts, the perfect test case for destabilizing the mainstream reader's assumptions. That is just what Eugenides has provided: while the case law (like the media coverage of such litigation<sup>284</sup>) has focused on questions raised by transsexuals and mostly adhered to a fixed, dichotomous understanding of sex and gender, especially in marriage cases, at least one judge has observed that courts and legislatures will be unable to escape recognition of the limits of the traditional male-female dichotomy when confronting challenges by intersexed individuals. Concurring in a Texas case that follows the majority view to invalidate a male-to-female transsexual's marriage to a male, Justice Angelini foresees the problem that this biology-based rule will pose for "those individuals whose sex may be ambiguous."<sup>285</sup> Further, in those cases with outcomes that *depart* from the traditional approach or majority view, the opinions often consider in dicta the reality of intersexual existence.<sup>286</sup> (Indeed, these opinions present transsexualism as simply one type of ambiguity or incongruity, in which genitalia and chromosomes diverge from sexual identity—similar to, for example, genitalia and chromosomes that do not "match."<sup>287</sup>) The story of Cal and his 5-alpha-reductase deficiency syndrome brings such issues from the margins to center stage, while avoiding some of the obstacles transsexuals have encountered.

The transformation of Cal's anatomy, without surgery, from baby girl to maturing young man challenges us to reconsider what "female," "male," and "normal"

283. Cf. *supra* note 212 and accompanying text (noting how advocates of same-sex marriage have found particularly sympathetic plaintiffs).

284. Feature stories about J'Noel and the lawsuit appeared in the popular press and on television. E.g., Alex Tresniowski et. al., *Split Heirs: Joe Gardiner Battles His Late Father's Second Wife—Transsexual J'Noel Ball—Over His \$2.7 Million Estate*, PEOPLE, Aug. 28, 2000, at 75; *Man Challenges Stepmother's Right to His Late Father's Estate, a Stepmother Who Used to Be a Man* (NBC Today Show, Jan. 24, 2004).

285. *Littleton v. Prange*, 9 S.W.3d 223, 232 (Md. Ct. Spec. App. 2002) (Angelini, J., concurring). She continues: "Having recognized this fact, I express no opinion as to how the law would view such individuals with regard to marriage." *Id.* Scholars, too, have recognized the effective challenges that intersexed individuals might present. See KESSLER, *supra* note 24, at 122 (explaining why "intersexuals are being embraced as the best representatives of transgender"); Coombs, *supra* note 251, at 258–61; Greenberg, *supra* note 109; see also *id.* at 323–25 (examining an unsuccessful employment-discrimination case brought by an intersexed worker).

286. See, e.g., *In re Estate of Gardiner*, 22 P.3d 1086, 1094–1100 (Kan. Ct. App. 2001); *Heilig*, 816 A.2d at 73–76; Berrigan, *supra* note 109, at 108 n.189, 109 n.197 (citing I. v. United Kingdom, App. no. 25680/94 (Eur. Ct. H.R. July 11, 2002)), available at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0>.

287. Prenatal exposure to hormones might explain such gender dysphoria. See *Heilig*, 816 A.2d at 75–76; see also *supra* note 131 (quoting Reiner as quoted in *Heilig*); cf. *supra* note 25 (noting Money's recognition of behavioral influence of prenatal exposure to hormones).

mean<sup>288</sup>—in a way that is likely to draw in every reader. When Cal chooses to assume a male identity, even the most rigid adherent of a dichotomous, either/or view of sex cannot quarrel with the choice: after all, Cal has always been chromosomally and physically male, even if his testicles are not externally visible. Certainly, it's difficult to imagine that any reader would fail to react with empathy and support for Cal's decision. Indeed, we cheer him on in his early, tentative steps to establish a romantic relationship with a woman (perhaps leading to marriage?),<sup>289</sup> and I predict a rigid "gender dichotomist"—someone who clings to a traditional, binary view of sex, gender, and sexuality—would do so too.

Now suppose Eugenides had written a different ending for *Middlesex*: what if Cal had decided to remain Callie, just as the parents had hoped and Dr. Luce had advised? She would have had surgery and hormonal treatments in order to continue the life of a female that she had been leading since birth. How would a rigid gender dichotomist respond to this scenario? Would not this reader's empathy and support remain, even if Callie then found herself in romantic relationships with men (again, just as the parents and physician had hoped)? Is it clear for the gender dichotomist that only one choice—a decision either to become Cal or to continue being Callie—is sound, while the other is deviant?<sup>290</sup>

Does all this mean that our hero could do no wrong, even in the eyes of a gender dichotomist? Not necessarily, because the gender dichotomist, I imagine, does not accept same-sex intimacy—or at least does not place it on a par with heterosexual relationships. So suppose either Cal (as a newly identified male) or Callie (as a continuing female) were gay, preferring as sexual partners members of the same sex, either male or female, respectively?<sup>291</sup> In fact, *Middlesex* raises this question as teenage Callie becomes sexually involved with both a female schoolmate (known only as the Obscure Object of Desire) and also the Object's brother—episodes that prompt Callie's sexual awakening and ultimate decision to live as a male. Does the gender dichotomist condemn one of these relationships but not the other? Which one?

Speculations about the gender dichotomist's reactions might demonstrate the staying power of homophobia, underscoring the emotional, even if irrational, hurdles it will continue to pose for same-sex marriage. More powerfully, however, these speculations necessarily raise questions about what we mean by a "same-sex" relationship for someone like Callie or Cal. Only a clear delineation between male and female can answer such questions, and yet history shows both that homophobic norms propelled

288. See also DREGER, *supra* note 30, at 189 (explaining that intersexed individuals usually have no metabolic disease warranting surgery, but rather just fail "to fit one particular definition of normality"); KESSLER, *supra* note 24, at 31 ("natural").

289. See EUGENIDES, *supra* note 1, at 514.

290. Indeed, intersexed individuals do marry. For example, Preves's book includes interviews with Robin, a chromosomal male with AIS who appears female, was reared as a female, and identifies as a female. The interviews portray her as happily married to a male. See PREVES, *supra* note 4, at 85, 112, 140.

291. For example, some transsexuals, after reassignment, find partners among members of their "new" sex. See, e.g., *supra* note 267 and accompanying text (noting transsexual marriages in Texas after *Littleton*); see also BUTLER, *supra* note 32, at 141–42 ("It becomes difficult to say whether the sexuality of the transgendered person is homosexual or heterosexual.").

whatever delineation we use today<sup>292</sup> and that the existence of a sure, "natural" basis for the delineation remains a fiction. In the end, Cal seems content to sidestep these questions, emerging as a straight male—albeit one with an extraordinary body, an unusual although not unhappy childhood, and an expanded perspective.<sup>293</sup> Of course, this outcome means that Cal leaves us wondering whether he would have won over or alienated the gender dichotomist if he had taken an even bolder step: refusing altogether classification as male or female.<sup>294</sup>

Once again, *Middlesex*—true to its name—enlightens by eschewing extreme positions in favor of complex fusions that stake out a middle ground. Just as Cal shows us, for example, that both nature and nurture play important roles in establishing identity,<sup>295</sup> here Cal both reinforces the gender hierarchy (by his choice to live as a straight male) and challenges rigid gender categories (by his "stereoscopic" way of looking at the world). Perhaps the rationale for male-female marriage requirements should no longer withstand careful examination, but being a straight male still beats the alternatives,<sup>296</sup> Cal's example seems to teach.

So, too, Cal straddles the divide that seems to distinguish destiny from desire. Readers might feel tempted to empathize with Cal, regardless of the way he resolves his sexual identity and preferences, because genetic fate set the stage for his tragic predicament, his unexpected "sex change." Cal's immature body betrayed him—in a way that seems to differentiate him from transsexuals who change from one sex to another.<sup>297</sup> Given the transformation he was biologically destined to endure, how could even the most stubborn reader deny Callie or Cal the opportunity to live a full life and to love another human being, whatever that person's sex or gender?

Yet, casting the problem this way relies on a biological model that portrays Cal and other intersexed individuals as the hapless victims of a condition or abnormality over which they have no control. According to this perspective, intersexed victims must make the best of their unfortunate situation, just like others with disabilities. Although this biological model might offer some legal advantages, victimhood carries accompanying disadvantages, as analyses of various strategies to advance gay rights

292. See *supra* notes 106–08, 117–18, and accompanying text (summarizing DREGER, *supra* note 30); see also FAUSTO-STERLING, *supra* note 11, at 112 (theorizing that debates about "intersexuality are inextricable from those over homosexuality").

293. That Cal had to defy, to disappoint, and to abandon temporarily his family, as well as to assume an entirely new identity, in order to choose this path of privilege shows how much it was worth to him. There were other possibilities open to Callie. For examples of the renunciation of privilege in the context of racial hierarchy, see *supra* note 94.

294. See *supra* note 99 and accompanying text (referring to queer theorists' resistance to such categories); see also Valdes, *supra* note 11, 265–66 (examining "penalization of gender atypicality/transitivity").

295. See *supra* note 85 and accompanying text.

296. See *supra* notes 91–95 and accompanying text.

297. Sharon Preves reports that some intersexed individuals seek to maintain their difference from transsexuals in order to avoid criticism and blame. See PREVES, *supra* note 4, at 114 ("Realizing that they could be assessed more blame for changing genders if they were mistakenly thought to be typical men or women undergoing sex reassignment, several [intersexed individuals who rejected the assignment given to them] maintained the import of distinguishing intersexuality from transsexuality."). But see KESSLER, *supra* note 24, at 122 (rejecting notion that locating difference in biology will address discrimination).



have explored.<sup>298</sup> A competing approach emphasizes desire rather than destiny, seeking to ground respect for the conduct of sexual minorities in autonomy. Although some saw promise for gay rights in equal protection arguments invoking biology,<sup>299</sup> the Supreme Court's recent majority opinion in *Lawrence v. Texas* unmistakably rests on liberty and choice,<sup>300</sup> not immutable characteristics. *Middlesex* gives us some of both: biology brings Cal to an extraordinary crossroads, but he chooses his own sexual future.<sup>301</sup>

#### IV. THE ROAD AHEAD: THREE THOUGHT EXPERIMENTS

With the insights that Cal's experience provides, we can imagine three different paths subsequent legal developments might follow. Consider these brief thought experiments that highlight the inordinate importance our culture has attached to gender—not fully developed proposals we are likely to see implemented anytime soon.

First, the law might adopt a multifactored approach to sex and gender. The *Heilig* court and the appellate court in *Gardiner* undertook this approach, relying on medical authorities and the legal analysis of Julie Greenberg. This approach necessarily means that not everyone will neatly fit either a "male" or "female" category, and legal decisionmakers will look to medical evidence to resolve questions of gender when some factors conflict or reveal ambiguity.

A second, and more far-reaching, approach would rest exclusively on individual autonomy.<sup>302</sup> Judicial reliance on liberty in both *Lawrence* and *Goodridge* gives force to this approach. Perhaps gender categories would be less problematic if they were open equally to all. Suppose each individual had the opportunity to choose a gender, with all of the social roles, performances, expectations, and norms that the given gender entails. Similarly, if a same-sex couple wished to marry, then one would elect

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298. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). Relying on "victimization" to gain legal advantages has been critiqued in other contexts as well. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994) (examining problems in the use of battered women's syndrome as a defense for women who kill their batterers). But see BUTLER, *supra* note 32, at 75–76.

299. See, e.g., Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law*, 27 FORDHAM URB. L.J. 279, 348–64 (1999) (addressing, inter alia, "Is Sexual Orientation Immutable? Presenting Scientific Evidence in Litigation to Gain Strict Scrutiny"); see also Baehr v. Lewin, 852 P.2d 44, 68–70 (Haw. 1993) (Burns, J., concurring) (considering the impact of evidence that sexual orientation is "biologically fated" in challenge to male-female requirement for marriage).

300. See *Lawrence*, 539 U.S. at 573–76.

301. Autonomy, empowerment, and "coming out" have emerged as important features of recent activism designed to change the secrecy, shame, and medical treatment traditionally associated with intersex. See, e.g., DREGER, *supra* note 30, at 170–97; KESSLER, *supra* note 24, at 80; PREVES, *supra* note 4, at 61–62, 135.

302. Surveying the reported cases, Greenberg concludes that "the vast majority . . . have rejected self-identification as the critical sex determinant." Greenberg, *supra* note 109, at 294.

an assignment as “husband” and the other as “wife.”<sup>303</sup> One might invoke religion as an analogy. Religion is often an important part of one’s life and identity,<sup>304</sup> but we give adults the freedom to choose a particular faith (or none at all). True, children often begin life in a particular religion chosen by their parents, but they become free to make a different choice when they mature.

This is precisely the approach to gender and sex that reformers of the medical treatment of intersexed children have proposed: parents should provisionally select a gender for rearing an intersexed child, but they should refuse consent for surgery until the child can participate in the decision.<sup>305</sup> The key ideas are that only the individual can know his or her preferred gender identity and that surgery can irreparably interfere with the choice the individual will eventually want to make. Cal illustrates how one might choose a gender different from that of childhood rearing.<sup>306</sup>

Although the intersex reformers and Cal’s story address choice for those who at least appear sexually ambiguous, why not allow *everyone* to choose? Most people, no doubt, will select the gender of their rearing, but some will prefer to “change” genders, with or without surgery. Why not defer to such *individual* selections, instead of insisting upon *medical* evidence about anatomy, “an irreversible and permanent change” through surgery, chromosomes, or even dysphoria, as *Heilig* and the appellate court in *Gardiner* require?<sup>307</sup>

Can we push further and use Cal’s story to imagine a third and even more provocative avenue for reform? Why not “abolish” gender<sup>308</sup>—or at least let go of its

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303. Cf. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001) (proposing alternative models of marriage for couples to choose).

304. For a related but different parallel between gender and religion, see DAVID L. KIRP ET AL., *GENDER JUSTICE* 120–23 (1986). The authors read the Supreme Court’s cases in both areas to have similar aims: “to protect free exercise, whether of religion or life choices; and to proscribe governmental imposition of conventions, establishments of religion, or sex-role stereotypes.” *Id.* at 120–21. More recently, David Cruz has called for the deinstitutionalization of gender, based on the parallels he develops to the First Amendment’s religion clauses. See Cruz, *supra* note 159.

305. See, e.g., FAUSTO-STERLING, *supra* note 11, at 79–80; Kipnis & Diamond, *supra* note 69; Reiner & Gearhart, *supra* note 69.

306. See EUGENIDES, *supra* note 1, at 479. This approach seems to capture Katherine Franke’s argument for “an underlying fundamental right to determine gender independent of biological sex.” Franke, *supra* note 103, at 99. Mary Anne Case makes a similar argument. See *generally* Case, *supra* note 103. Note that the argument assumes the existence of separate and identifiable gender categories.

307. See also KESSLER, *supra* note 24, at 121 (reporting the guiding principle of transgender movement is to allow freedom to change sex and gender, whether temporarily or permanently).

308. See BUTLER, *supra* note 32, at 81 (“gender as a mode of becoming”); *id.* at 144 (questioning binary categories); FAUSTO-STERLING, *supra* note 11, at 101 (suggesting that we multiply the number of recognized genders, but that doing so might ultimately make gender irrelevant); *id.* at 110 (preferring “to dispense with claims to a separate intersexual identity”); KESSLER, *supra* note 24, at 90 (questioning activists’ promotion of intersexuality as a new identity); *id.* at 128 (suggesting “genital reconceptualization”); *id.* at 130 (suggesting we talk “differently about intersexuality . . . [by] not seeing it”); PREVES, *supra* note 4, at 154 (urging

extraordinary significance? Imagine a world in which everyone had the “stereoscopic” vision that Cal claims—and in which Callie’s decision to become Cal was not worth the trouble or, perhaps, was unintelligible.<sup>309</sup> Imagine a world in which chromosomes or genital anatomy or sexual orientation were as irrelevant to one’s place in society as Thurgood Marshall, arguing *Brown v. Board of Education*,<sup>310</sup> suggested that eye color was (and race should be).<sup>311</sup> What would marriage look like in this world? Could we conceptualize marriage as the *Goodridge* majority defines it: “the voluntary union of two persons as spouses, to the exclusion of all others”?<sup>312</sup> Could this be where the Supreme Court’s anti-stereotyping analysis and popular culture’s dissemination of transgender tales will eventually take us, eliminating the rigid categories that now go hand-in-hand with the subordination of women and sexual minorities?<sup>313</sup> How can we acknowledge and respect differences without perpetuating hierarchies and disparities in power? How can the law help achieve such goals?

For answers to these questions, we must await new chapters in the saga of sex and gender and their evolving roles in life and law—just as when enjoying a good novel one looks forward with curiosity and excitement to learn how the story will end. One thing is clear already, however: popular culture both reflects and reinforces a significant turning point in the plot, with more developments sure to follow. Read on.

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that “[w]e must remove or reduce the importance of gender categorization and the need for gender categories, including the category of intersex itself”); see also Dalton, *supra* note 195, at 266 (“the goal of gender neutrality is ultimately unachievable so long as the courts remain incapable of imagining a gender-free subject”). But see Case, *supra* note 103, at 75 (rejecting abolition of gender as a normative goal).

309. Cf., e.g., Halley, *supra* note 93, at 82, 94–96; Valdes, *supra* note 11, at 265–66. Even popular culture has begun to consider this possibility. See, e.g., Anna Quindlen, *Outside the Bright Lines*, NEWSWEEK, Aug. 11, 2003, at 64 (commenting on Boylan’s book, *supra* note 82); Jacqueline White, *Where No Woman (or Man) Has Gone Before: News from the Frontiers of Gender*, UTNE READER, Sept.–Oct. 2003, at 32, 34 (noting the response to “transpeople” on college campuses, including gender-blind dormitory at Wesleyan University).

310. 347 U.S. 483 (1954).

311. See ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 44 (Leon Friedman ed., 1969). Of course, reducing the importance of gender in the social and legal hierarchy might permit some temporary consideration of gender for the traditionally subordinated group—just as we have learned to accept with respect to race. See *Gutter v. Bollinger*, 539 U.S. 306 (2003). Indeed, Marshall’s oral argument noted that we have not subordinated “blue-eyed people” with “the badge of slavery.” ARGUMENT, *supra*, at 44.

Kessler suggests a different analogy: “Treating genital formations as innate but malleable, much like hair, would be to take them and gender less seriously.” KESSLER, *supra* note 24, at 132.

312. 798 N.E.2d at 969 (presenting a “reformulation” of “civil marriage”).

313. See also KESSLER, *supra* note 24, at 124 (“If gendered bodies fall into disarray, sexual orientation will follow.”).